THE LAW QUARTERLY REVIEW.

No. LXII. April, 1900.

NOTES.

IN *The Paquete Habana, The Lola* (1899) 175 U. S. 677, the opinion of the majority of the Supreme Court of the United States, delivered by Mr. Justice Gray, lays it down as a rule of international law, settled by the general consent of the civilized nations of the world, 'that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.' Chief Justice Fuller and Justices Harlan and McKenna dissented, partly on the ground that whatever general usage exists is matter of grace and not of right, partly because they considered that the vessels in question were engaged not in ordinary coast fishing but in wholesale fish trade, and were therefore not entitled to the benefit of the usage. In the face of the talk sometimes heard even in high political places about the law of nations being no true law, it is well to have the sound principle reaffirmed by Gray J. in words from which probably no member of the Court would dissent:—'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.' Whether conventional or customary in the particular case, international law is true law to be administered by regular legal and judicial methods.

H and *W*, both French citizens domiciled in France, intermarry at Paris in 1854. The marriage takes place without any marriage contract or settlement, and is under French law subject to the *régime*

de la communauté. Some years later *H*, and *W* his wife, settle and become domiciled in England, and also become naturalized British subjects. At the time of their settlement in England they are in poverty. Whilst they are in England *H* makes a large fortune in trade. In 1895 he executes a will in the English form disposing of the whole of his property, which consists both of realty and of personalty. The succession to *H*'s movable property is, however, governed by the law of France, i. e. by the law of the matrimonial domicil, and not by the law of England, so far as concerns the wife's rights. This is the legal effect of *de Nicols* v. *Curlier* [1900] A.C. 21, 69 L. J. Ch. 109, wherein the House of Lords reversed the decision of the Court of Appeal [1898] 2 Ch. 60, and restored the decision of Kekewich J. [1898] 1 Ch. 403. The practical result is that *W* has established her title under French law to half *H*'s movable property.

To a student of private international law *de Nicols* v. *Curlier* is a case of first-rate importance, and suggests several reflections.

1. A question which has hitherto been left open for discussion (see Westlake, Private International Law, 3rd ed., p. 68; Dicey, Conflict of Laws, p. 650), namely whether the law of the matrimonial domicil governs the rights of a husband and wife to movables acquired after a change of domicil, has now been definitely decided by the House of Lords in the affirmative. Their Lordships have in this matter followed the view of continental authorities, and especially Savigny, as represented among English writers by Mr. Westlake, and have declined to follow a line of American authorities which probably were guided and were certainly supported by Story (Conflict of Laws, s. 187).

2. The principle adopted by the House of Lords is in itself sound.

3. In order to arrive at a sound result, their Lordships have distinguished from the case of *de Nicols* v. *Curlier* the case of *Lashley* v. *Hog*, 4 Paton 581, though the Court of Appeal thought that the two cases were indistinguishable, and that the principle of *Lashley* v. *Hog*, expounded in a lengthy judgment by Lord Eldon, was fatal to the claim of the appellant in *de Nicols* v. *Curlier*. A student of legal history may be allowed to doubt whether the subtle distinction drawn by their Lordships would have commanded the acquiescence of Lord Eldon.

4. The judgment of the House of Lords apparently rests on the principle that when persons domiciled in France marry under the *régime de la communauté*, they in effect enter into a contract which binds the subsequently acquired property of the husband and wife, and is not affected by their change of domicil. But this principle, if logically carried out, applies to immovable, no less than to

movable property, whence the further consequence would appear to ensue that the marriage of persons domiciled in France, or even it may be the marriage of an Englishwoman domiciled in England to a Frenchman domiciled in France, affects the rights of each of the spouses in regard to real property in England. If this be so the firmly-established principle that rights to English land are governed wholly by the *lex situs*, i. e. by the ordinary law of England, though in theory perhaps left untouched, is in effect modified by the decision of the House of Lords in *de Nicols* v. *Curlier*. The marriage would, on this view, operate as a covenant to settle the land, or its proceeds, in accordance with what may be called the French statutory settlement.

South African Breweries Lim. v. *King* was treated by the Court of Appeal [1900] 1 Ch. 273, 69 L. J. Ch. 171, as a very plain case, as indeed it was when disengaged from gratuitous and irrelevant complications. The question suggested in our comment on the decision now affirmed (L. Q. R. xv. 341) will have to wait for a more adequate opportunity of judicial consideration.

How subtle may be the distinctions on which a taxpayer's liability may depend will be further seen by any one who studies the *Equitable Life Assurance Society of the United States* v. *Bishop* [1900] 1 Q. B. 177, 69 L. J. Q. B. 252, C. A., together with *Last* v. *London Assurance Corporation* (1885) 10 App. Cas. 438, and the *New York Life Insurance Co.* v. *Styles* (1889) 14 App. Cas. 381.

In these cases the 'simple' question, as the plain man of common sense would put it, which calls for decision is whether the surplus returned or credited by an insurance society to policy holders does or does not constitute annual profits or gains, and therefore is or is not assessable to income tax.

To put the matter broadly, *Last* v. *London Assurance Corporation* [1895] 10 App. Cas. 438, appears to decide that such a bonus does constitute annual profits or gains, and is therefore liable to income tax.

The *New York Life Insurance Co.* v. *Styles* appears to decide that such a surplus does not constitute annual profits or gains, and is not liable to income tax, whilst in the *Equitable Life Assurance Society of the United States* v. *Bishop*, the Court of Appeal follow *Last* v. *London Assurance Corporation*.

Now the point to be decided is, in fact, as a question whether of economics or of law, in reality a difficult one, and it would be rash to maintain that in the two cases which have come before the House of Lords there were not differences which justified their Lordships in deciding in 1885 that the surplus returned to policy holders was, and in 1889 that it was not, chargeable with income tax, and there

is still less reason to question that the Court of Appeal have rightly thought that in the case before them they were bound to follow the earlier judgment of the House of Lords.

What we do insist upon is, that the distinctions drawn by the House of Lords were extremely fine, so fine indeed that they could not be recognized either by Lord Halsbury or by Lord Fitzgerald. Were it indeed permissible to question the legal infallibility of the final Court of Appeal, a critic might be inclined to agree with Lord Bramwell that their Lordships made a mistake when they gave judgment in *Last* v. *London Assurance Corporation*, and to add that, under Lord Bramwell's influence in the *New York Life Insurance Co.* v. *Styles*, they corrected by a desperate effort of logical agility an error of which they could not admit the existence. Some lawyers continue to regret that the House of Lords has bound itself by the dogma of its own infallibility, which appears to have been first enunciated by Lord Campbell in the year 1852.

A's servant wrongfully sells goods of *A*'s to *X*, who purchases them with the knowledge that the servant is dealing with the goods improperly. The servant pays the money received, amounting to about £1,500, into his account at a bank. *A* brings an action against the servant and claims damages for conversion or, in the alternative, for money had and received. Ultimately the action is compromised on the terms of the servant paying £1,125 to *A* in settlement of all claims against the servant without prejudice to any claim of *A*'s against *X*. Before the settlement with the servant *A* begins an action against *X* for conversion of the goods. The defence is raised that by the proceedings in the former action against the servant, *A* has affirmed the sale and has waived the tort, and that therefore the action against *X* is not maintainable. It is held by the Court of Appeal that the tort has not been waived, and that an action lies against *X*.

This is the effect of *Rice* v. *Reed* [1900] 1 Q. B. 54, 69 L. J. Q. B. 33, C. A. The practical result is satisfactory, but some minds may feel rather more difficulty than seems to have been felt by the Court of Appeal in arriving logically at a conclusion which in the particular instance was substantially just. Vaughan Williams L.J. points out that if in the action against the servant £1,125 had been recovered under a judgment of the Court, either as damages for conversion or as money had and received, it would have been impossible to maintain any action against *X*. But in point of reason it would appear to make very little difference whether the servant pays the £1,125 rather than have the action proceed to judgment, or on the judgment being signed, pays the £1,125 rather

than have his goods seized in execution. In either case *A* does in reality, if not technically, recover £1,125 from the servant on the ground of his having converted *A*'s goods. It may be unreasonable that such recovery should be in any case a conclusive answer to an action against *X*, but if it be allowed to be a defence at all, there is something singularly technical rather than reasonable in the idea that the effect of payment by the servant as regards the liability of *X* depends upon the inquiry whether the payment was made just before or just after the recovery of judgment against the servant.

[This case is independently discussed by Mr. W. H. Griffith in the body of this number.]

P employs his agent *A* to purchase land for him. *T*, a landowner, promises *A* that if *A* can obtain a purchaser of his land for him, he will pay him a commission of ten per cent. on the price paid. *A* induces his principal *P* to purchase *T*'s land. When the bargain was made between *T* and *A*, *T* did not know that *A* was acting as an agent for *P*, but before the contract between *P* and *T* is completed, *T* does know that *A* is acting as *P*'s agent. He does not disclose to *P* the arrangement as to the payment of commission, nor is it in fact disclosed to *P* by *A*. Under the bargain between *T* and *A* the commission amounts to £2,500. By a subsequent and private agreement between *T* and *A* it is reduced to £2,000. *P*, *A*'s principal or employer, has a right to treat the whole £2,500 due to *A* under the original arrangement as in effect his money or, in other words, as a bribe paid to *P*'s agent or servant at *P*'s expense, and can recover it from the agent *A* if it has been paid to him, or from the seller of the land, *T*, if it has not been paid to the agent. This is the effect of *Grant* v. *The Gold, &c. Exploration Syndicate, Ltd.* [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, C. A. The judgments in the Court of Appeal appear to imply, if they do not positively lay down, that if the whole price paid for the land, as increased by the commission, had been paid to the landowner *T*, who had on his part paid the commission to *P*'s agent *A*, *P* might have recovered the amount of the commission either from *T* the seller or *A* the agent.

This case deserves the most careful attention both of the public generally who have been interested in Sir Edward Fry's and Lord Russell of Killowen's efforts to put an end to secret commissions paid to agents, and of all men of business who, whether as directors, promoters of companies, or under any other name, act as agents for others. It illustrates several points on which it is hardly possible to insist too often.

1. The morality of the law, as regards the duties of agents, is absolutely sound, and rises far above the morality of the business world.

2. An agent's seeing no harm in what he is doing is no defence for acts which are in fact unfair to his employer. Dishonesty does not change its character because it is sanctioned by custom.

3. The whole evil of commissions lies in their secrecy.

It will be observed that all the Lords Justices were of opinion, though they were not called on to decide, that an action for deceit will lie for active concealment of a fraudulent commission transaction such as took place in the present case.

By English law damages are the normal redress for breach of contract; specific performance an extraordinary remedy only to be had in Equity. This rule, now part of the very constitution of every English lawyer, has warped our legal conceptions. Specific performance may not always be practicable, because the Court cannot make prima donnas sing or dance, or quarrelsome partners work in harmony; it would only stultify itself if it tried to do so, but this does not alter the fact that specific performance is the natural, the ideal remedy. Damages are a solatium to a man for not getting what he wanted, but a solatium is something quite different from giving him the thing itself for which he bargained. *Hope* v. *Walter* ([1900] 1 Ch. 257, 69 L. J. Ch. 166, C. A.) is illustrative incidentally of the attitude which English Courts take up towards specific performance as something abnormal and of 'extraordinary jurisdiction.' The case was one of very great nicety. The contract for sale was good; there was no case for rescission; the sole point was whether it was one for the Court specifically to enforce. The vendors were clear of offence; they were ignorant that their tenant had been surreptitiously using the premises as a brothel in violation of the covenant against such user. The purchaser was equally ignorant that the 'eligible investment' had been so discredited. So far the balance of justice, or judicial discretion, was even. What turned the scale in the estimation of the Court of Appeal was that to decree specific performance might expose the purchaser not only to the stigma of being a brothel proprietor, but to a prosecution under the Criminal Law Amendment Act, 1885. The law does not force a man to buy a lawsuit, still less a prosecution. This was a good point forensically, but there was not much substance in it, seeing that the purchaser had the power of getting rid of the obnoxious tenant at once—that in fact the nuisance had already come to an end. Would the argument have prevailed but for that engrained idea which regards specific performance as the exceptional and not the normal mode of enforcing contracts?

A stamp duty case does not promise to raise curious questions of legal theory; but *Muller & Co.'s Margarine, Lim.* v. *Inland Revenue Commissioners* [1900] 1 Q. B. 310, 69 L. J. Q. B. 291, C. A., shows that it can do so.

What, for example, is a contract made in the United Kingdom?

The answer is that, as far at any rate as the Stamp Act, 1891, s. 59, sub-s. (1), is concerned, a contract is made in the country where the signature of the last necessary party to it is affixed.

What, again, is the locality of such a very intangible kind of thing as the goodwill of a business?

The Court of Appeal reply that where the goodwill of a business is sold for a lump sum, together with the premises where the business is carried on, the goodwill is primâ facie annexed to the premises; and that, if the premises are situate out of the United Kingdom, the goodwill is to be treated as property locally situate out of the United Kingdom within the meaning of the enactment in question, and therefore the contract for its sale is not liable to stamp duty.

We are not disposed to quarrel with either of these answers, but they suggest two observations. The first is that there is some difficulty in distinguishing satisfactorily between this case and the *West London Syndicate Case* [1898] 2 Q. B. 507, 67 L. J. Q. B. 956, C. A., in which the Court held that goodwill was not locally attached to the premises where the business was carried on; the second is that as a matter of policy it is dubious whether liability to taxation ought to be made to turn upon distinctions which, even though they be rightly drawn, are too subtle for popular apprehension. With regard to the first of these points, it may be suggested that precise locality, such as the difference between one street and another in London, may well be immaterial even where the difference of being in or out of the United Kingdom would be material. The circumstances of the business must of course be regarded in each case.

The Attorney-General v. *London & North-Western Railway Co.* [1900] 1 Q. B. 78, 69 L. J. Q. B. 26, C. A., exemplifies the well-established principle that a public body such as a railway company which acts under statutory powers can under no circumstances lawfully infringe any term introduced into the Act of Parliament under which it exists, in the interest of the public, and that such infringement may be restrained by means of an information, even though no injury may have actually resulted to the public from the infringement. Hence in the particular case the London and North-Western Railway Company has been restrained from passing over a level crossing at a greater speed than is allowed by Act of Parliament,

although no proof was given that any one had been actually damaged thereby. No doubt in the particular instance and in others like it the restriction may be inconvenient, and this is a very good reason why legislators should not hamper the action either of individuals or of corporations by undue restraints, and why any restriction proved to be noxious or useless should be removed. But the principle that corporations acting under statutory authority are bound at all costs to obey the statute under which they exist is of supreme importance and ought to be rigidly enforced. A dispensing power would be even less tolerable in the hands of railway companies than in the hands of the Crown.

At last the much vexed 'waiver clause' has come before the Court, and, happily, before the Judge of all others most competent to deal with the matter—the Master of the Rolls. The result is a decision qualified in a sense, but as a whole most damaging to the credit of the clause. There may be—the Court admitted—a legitimate use of the clause, where honestly minded directors desire to protect themselves against the indefinite liability attaching under s. 38 to non-disclosure even of immaterial contracts, but this bonâ fide uncertainty is not, as the initiated well know, the purpose for which the clause is employed. It is employed, as it was in *Greenwood* v. *Leather Shod Wheel Co.* [1900] 1 Ch. 420, 69 L. J. Ch. 131, C. A., deliberately to keep a contract out of the ken of the shareholders, because the promoters or directors dare not disclose it. For this purpose the clause is now worthless, and worse than worthless, because as Lindley M. R. remarked: 'the introduction into the prospectus of a tricky waiver clause, instead of preventing the prospectus from being deemed fraudulent, affords an additional reason for holding it to be so in fact.' What renders the waiver clause even more hopeless as a fraud protector is that promoters who wish to rely on such waiver must show that the shareholders' attention was called to the facts, which is of course the very thing the inserters of the clause are anxious to avoid. All which goes to show that honesty is really the best policy.

Not one per cent. of intending shareholders, as Byrne J. lately remarked, read the company's articles. Promoters are perfectly aware of this fact and they spin their web accordingly, that is, they too often introduce into the articles very improper clauses, hoping they will escape observation in the crowd—clauses which sometimes purport to protect the promoters and directors from liability for any fraud or misconduct on their part. Even if the clauses are not as unscrupulous as this, they very likely infringe some statutory or common law right of the shareholder. Sooner or

later, however, they come to light, and when he complains he is told that he has tied his hands and can get no redress; and probably hardly any shareholders a year or two ago would have tried to do so—that is, ventured to challenge the validity of such articles. There were the decisions to be faced, which say that a shareholder must be taken to have read the articles and to have understood them properly, and there was the section of the Companies Act (s. 16) to be reckoned with, which declares that the shareholder is to be bound as if he had covenanted under seal. But of late, at the instance of some courageous shareholders, the Courts have been bestowing a much more vigilant scrutiny on articles. In *In re Peveril Gold Mines* ([1898] 1 Ch. 122) the Court disallowed an article derogating from the shareholders' statutory right to present a winding-up petition; in *In re Baring Gould Syndicate* ([1899] 2 Ch. 80, 68 L. J. Ch. 429, C. A.) again the Court disallowed an article which purported to take away the right of a dissentient shareholder on a reconstruction, to have his interest assessed by arbitration under s. 161 of the Companies Act and substitute for it the price which the shares he might have had should have realized in the hands of the liquidator. Now in *Paine* v. *Cork Co.* [1900] 1 Ch. 309, 69 L. J. Ch. 156, the Court has been defeating a similar attempt to that in *In re Baring Gould* to evade the statutory safeguards imposed on a reconstruction, by giving power to the liquidator under a voluntary winding up to sell the business and assets of the company on terms different to those exacted by sections 161, 162 of the Companies Act, 1862, and, need it be said, not affording the same protection to the dissentient shareholders. These decisions are doubtless helping to educate the shareholder.

X, living at Sheffield, applies for shares in a company whose offices are in London. On the afternoon of October 26 a letter of allotment is made out. About 7 a.m. on October 27 it is taken to the London General Post Office, and given to a postman outside the Office, who does not in fact then post it, and has not authority to receive letters to be posted. It is apparently posted at about 11 a.m. on October 27 and reaches *X* the same day at 7.30 p.m. Meanwhile *X*, on the evening of October 26, posts a letter at Sheffield withdrawing his application. This withdrawal was received by the company on October 27 at about 8.30 a.m. The letter of withdrawal being received by the company before the allotment, i. e. the letter of acceptance, is *posted*, there is no contract between *X* and the company.

This is the effect of *In re London & Northern Bank* [1900] 1 Ch. 220, 69 L. J. Ch. 24. The Court has applied with the utmost

strictness, and, as it appears, correctly, the rule that a contract to be made through the post is not completed until the final letter of acceptance is posted. *X*, it may be added, was in the particular instance fortunate. If the letter of acceptance had been posted at 7 a.m. on the 27th, the contract would have been complete, and he would have been bound thereby.

The case raises, but does not decide, the curious inquiry, whether a letter is received by the person to whom it is sent at the moment when the postman leaves it at his house, or at the moment when he in fact reads it, or at the moment when in the ordinary course of things he might be expected to read it? This casuistry of the Post Office had better be left for the decision of the Court when some case requires its solution.

The incidence of liability for repairs of leasehold property—dilapidations to put it shortly—is at all times a matter which in Bacon's phrase comes home to men's 'business and bosoms,' and *In re Parry and Hopkin's Arbitration* ([1900] 1 Ch. 160, 69 L. J. Ch. 190) possesses a special interest, because the situation there is one likely to recur. In that case leasehold property held under a repairing lease was given by will to *A* for life, with remainder to *B*. *A* dies leaving the premises in a dilapidated state. Has *B* any claim against *A*'s estate in respect of the neglect to repair? North J. has decided that he has not, and he founds his decision on the authority of *In re Cartwright, Avis* v. *Newman* (41 Ch. D. 532). There a legal tenant for life of freehold land died leaving the buildings upon the land in a dilapidated condition, and in the administration of the tenant for life's estate it was held that the remainderman could not claim compensation from her estate by way of damages for permissive waste: but here there was absent the material element, which was present in *In re Parry*, an express duty to repair. In such a case the tenant for life, as *In re Betty* [1899] 1 Ch. 821, 68 L. J. Ch. 435 shows, takes the property with the burdens imposed, and his estate is liable at the suit of the trustees of the settlement. If so, why not at the suit of the remainderman? As Lord Coke says, 'He that suffereth a house to decay, which he ought to repair, doth the waste.'

Courts of equity discover no disposition to relax their strictness in the matter of irrevocable gifts to persons in a confidential relation to the donor, as *Powell* v. *Powell* [1900] 1 Ch. 164, 69 L. J. Ch. 164, shows. The doctrine of English law in these cases is based not on any actual exercise of undue influence by the parent, guardian, spiritual adviser, &c., as the case may be, but on the presumption, founded on experience, of the risks of undue influence arising from

the confidential relation. It is open to the donee to show that in the particular case the influence was not abused in his own interest, that the gift was freely made and fairly made, but the onus rests on him to do so, and for this purpose the law, recognizing the subtle atmosphere of influence which surrounds the confidential relation, has wisely established certain definite tests. One is that the donor was completely emancipated from the influence of the donee, but this is seldom relied on. The other is to show that the donor had an antidote to such influence in the shape of independent professional advice. *Powell* v. *Powell* is valuable as bringing into relief several points not always sufficiently realized. In the first place the solicitor is not an independent adviser if he is acting for both donor and donee. He cannot be, for he has then a divided, where he ought to have an undivided duty. In the next place his duty is not confined to satisfying himself that the donor understands the particular transaction and wishes to carry it out. He must also satisfy himself that the gift is a right and proper one for the donor to make, that is, he must protect the donor against himself, against the impressionability of youth and its generous but imprudent impulses. Finally, the would-be donor must follow the advice given. If he does not, but insists on disregarding it, the rule of protection would be stultified. The solicitor in such a case not only advises—*supplet aetatem.*

A mortgagee may stipulate for a collateral advantage without infringing the rule against clogging, provided there is nothing unfair or oppressive in the bargain. This is the new starting point in questions of clogging the equity of redemption. Now the further problem has presented itself, whether the bargain for collateral advantage is valid if it is to go on after the mortgage has been paid off and the security closed. In *Rice* v. *Noakes* ([1900] 1 Ch. 213, 69 L. J. Ch. 43) Cozens-Hardy J. has held that it is not valid. In that case, as in *Santley* v. *Wild* ([1899] 2 Ch. 474, 69 L. J. Ch. 681), it was a 'tie' covenant, entered into by a publican with his brewer mortgagor, which raised the question—a covenant which was to run with the leasehold property mortgaged until the expiration of the lease in 1923. The publican had paid off the mortgage, but the brewer's contention was that the tie was still subsisting. How was the retention of such an equitable burden—this was the way the case presented itself to Cozens-Hardy J.—consistent with the reconveyance of the property on the payment off of the mortgage property?—the very idea of a mortgage involving the principle that the mortgagee when paid off should have no interest in the mortgaged premises and no

right to interfere with the mortgagor in his enjoyment or uses of the property. But is this conclusion irrefragable? Once concede that the mortgagee may stipulate for a collateral advantage and there seems no reason why that part of the bargain should not extend beyond the reconveyance. In the case in question the conveyance of the premises was not made a security for the performance of the tie covenant: had it been, the mortgagor would of course have had no right to claim a reconveyance until the end of the period covered by the tie was reached.

Puff. 'Why! by that shake of the head he (Lord Burghley) gave you to understand that even though they had more justice in their cause and wisdom in their measures, yet if there was not a greater spirit shown on the part of the people, the country would at last fall a sacrifice to the hostile ambition of the Spanish monarchy.'

Dangle. 'Zounds! did he mean all that by shaking his head?'

Puff. 'Every word of it.'

Hardly less significant than Lord Burghley's shake of the head was—according to the plaintiff—the letter in *In re Fickus, Farina* v. *Fickus* [1900] 1 Ch. 331, 69 L. J. Ch. 161. 'You are of course aware,' wrote the prospective father-in-law to his daughter and suitor, the plaintiff, 'that, with my large family, Eliza will have little fortune. She will have a share of what I have after the death of her mother.' There was nothing on the face of it very committing about this, but under the influence of the plaintiff's imagination or his solicitor's constructive genius, these simple words—paraphrased—became this: 'If you, Mr. Farina, will make a settlement on my daughter before her marriage, I will give my assent; and subject only to the rights of my widow, as to which I reserve myself a free hand, I will bind myself to leave her by will an equal share with all my other surviving children, and my property subject only to debts and testamentary expenses.' 'Zounds!' we exclaim with Dangle, 'did it mean all that?' But the colours with which Mr. Farina's hopes had filled in the picture faded sadly in the cold, dry light of Chancery. First, where was that necessary thing, the contract, to be found? All the Court could discover was a representation that the testator was not in a position to make any proposal or give his daughter anything at the time, but that he intended to give her something at his death. Even this surmounted, and a contract found, where was the breach? The daughter did receive a share, though it was not an equal share, as Mr. Farina too easily took for granted. This is where the critical clearness of the lawyer has the advantage of the layman.

A question rather apt to be overlooked in this class of cases is whether the alleged promise could, at the time when it was made, be reasonably regarded as intended to create any legal obligation. Here the words used amounted, when one reads them impartially, to a refusal to make a promise, though a refusal purposely expressed in the mildest form and coupled with an expectation (not a promise) of benefits to come.

'Really, Mr. ——, this is very elementary!' was a remark which the late Sir George Jessel had occasion to make at times to distinguished counsel, and the remark might well have been made in *In re Stamford Banking Co. and Knight's Contract* ([1900] 1 Ch. 287, 69 L. J. Ch. 127). If anything is well settled in the law of vendor and purchaser and the practice of conveyancers it is that a purchaser, in the absence of special conditions, is entitled to have every deed constituting a link in the chain of the vendor's title abstracted in chief: the introduction of them as recitals in other abstracted instruments is not sufficient. If it were, then, as the late Mr. Dart points out, a copy of the conveyance to the vendor might in many cases take the place of an abstract; besides which the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in the document, but which are not noticed in the recital. All this is very clear to us and very rational, but to future generations who will go about with their title (or someone else's title, as the case may be) in their waistcoat pocket in the shape of a land registry certificate, how will it all appear? It is painful to think what a sorry figure the nineteenth century conveyancer will cut in the pitying retrospect of such a posterity.

The Court of Appeal has held by a majority that where a man makes a contract in his own name, intending in fact, but not to the knowledge of the other party, to contract as an agent, and not having authority at the time, the intended principal can ratify the contract, and acquire the benefit and the burden of it, no less than if the other party had believed himself to be dealing with an agent. In other words, there may be a merely potential as well as an actual undisclosed principal at the date of the contract: *Durant & Co.* v. *Roberts* [1900] 1 Q. B. 629, 69 L. J. Q. B. 382. The novelty and importance of the decision are shown by the fact that A. L. Smith L.J. dissented in an elaborate judgment.

Earle v. *Kingscote* [1900] 1 Ch. 203, 69 L. J. Ch. is discussed by Mr. Cyprian Williams under the title of 'A husband's Liability for his wife's Torts,' at p. 191 below.

The Court of Appeal has affirmed the judgment of the Queen's Bench Division in *Att.-Gen.* v. *London C. C.* (see [1900] 1 Q. B. 192, 69 L. J. Q. B. 241) on which we have already commented. The Court of Appeal, it will be noticed, in effect admit that their judgment establishes, as we pointed out, a serious anomaly.

We have noted with amusement and also with amazement the expression by publicists who ought to be better informed of a wish for a list to be laid before Parliament of the rich men who have evaded, as the expression goes, the payment of Estate Duty. The culprits whose names are to be held up for public odium are apparently persons who, having been charged by the Crown with liability to pay Estate Duty, have established on appeal to the Courts that they were not liable to pay it. The evasion is in reality nothing but a refusal to pay an alleged debt which on examination turns out not to be really owing, i.e. not to be a debt at all, and the complaint against men described rhetorically as millionaires is nothing else than that, in common with every other citizen, whether rich or poor, they have objected to pay taxes not imposed upon them by law. No doubt there was once an English king whose law officers maintained that it was criminal for any private subject to dispute the legality of any interpretation by the Crown of its own powers. His name was James II, and the results of his experiment were not encouraging.

Appeals on the construction of the Workmen's Compensation Act, 1897, continue to increase and multiply. It would not be fair to judge the operation of the Act as a whole by the difficulties which arise in disputed cases; and it may well be that, directly or indirectly, the utility of the Act has already justified its existence. But it is certain that in cases where any dispute can be raised the Act has made the law more complicated and doubtful than ever, and that, whatever the benefits may be, this is a serious drawback which ought to be removed by consolidating and simplifying the whole law on the subject.

In the American Law Register for March, p. 132, Prof. Ames of Harvard expresses the opinion of trained American lawyers on the so-called legal education provided by our Inns of Court.

ERRATUM.—January part, page 5, line 9 from bottom, *for* 'Quarter Sessions' *read* 'Court of Session.'

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

PENALTIES FOR FAILURE TO PERFORM WITHIN A LIMITED TIME UNDER A SUBSTITUTED CONTRACT.

I HAVE lately had occasion to endeavour to ascertain the rule of law which governs a provision in a building contract for the payment of a penalty per diem for failure to perform within a fixed time, when the contract has been varied before breach by mutual agreement of the parties to an extent which makes completion within the stipulated time impossible, and I have found the dicta of the text-books uncertain and apparently contradictory. But each dictum is accompanied by a reference to a case, and it would therefore seem that the cases must be more or less inconsistent, or that the authors of the text-books which I have consulted must have failed to appreciate and distinguish properly the cases which they cite. Or it may be that there is not any direct inconsistency between the statements of the text-writers, or in the cases which they cite, but that the facts of all the reported cases are so varied, and are in each instance so essential to the particular decision, that a definite and comprehensive rule capable of unqualified application to other facts cannot be extracted from them. On page 120 of Emden's Law of Building Leases and Building Contracts, I find the following passage:—

'We will now proceed to consider what is the effect upon a stipulation in a contract that the builder shall complete the buildings by a specified time, and in default forfeit a certain sum, of a subsequent order by the employer for extra work which necessitates additional time. Subject to any express terms in the agreement, such an order may entitle the builder to claim the time necessary under the circumstances to execute the extra work in addition to that originally fixed, but as regards the stipulation as to time, and in all other respects, the original contract will stand; with the exception that if the order for extra work is so inconsistent with the terms of the original contract that they cannot subsist together, and it becomes impossible to complete the work in the first agreement until the additional work is completed, the subsequent agreement will be held to discharge the former. And consequently, if the employer knew or must have known that the additional work would render it impossible to perform the contract as originally made, the second agreement will operate as a waiver of the stipulation as to time in the first agreement, and a consent that the completion of the work shall be postponed until after the lapse of a reasonable time for carrying out the work as altered.'

This passage appears to be intended to indicate the existence of a definite rule of law which governs the operation of a provision for the forfeiture of a daily or weekly penalty upon failure to complete the contract within the specified time, in a case in which a subsequent order from the employer for extra work necessitates additional time to perform the contract. But I do not think that it clearly states the exact nature and scope of the rule which it purports to express. 'Such an order,' it is said, 'may entitle the builder to claim the time necessary under the circumstances to execute the extra work in addition to that originally fixed, but as regards the stipulation as to time, and in all other respects the original contract will stand; with the exception that if the order for extra work is so inconsistent with the terms of the original contract that they cannot subsist together, and it becomes impossible to complete the work in the first agreement until the additional work is completed, the subsequent agreement will be construed to discharge the former.' Does this statement mean that in every case not coming within the exception mentioned the provision for daily or weekly penalties in default of completion within the specified time remains in force and will commence to operate at the expiration of the additional time necessary to perform the extra work? Or does it mean that the work originally included in the contract must be done within the specified time, and that additional time can be claimed in respect of the extra work only, as the subject of a subsequent and distinct contract? In cases coming within the exception described, the 'subsequent agreement' would not be an addition to the original contract. It would be an entirely new contract substituted for the original one; and the question which immediately suggests itself is how much of the original contract is incorporated or repeated in the new one? The original stipulation to complete within a specified time would undoubtedly be discharged; but, in the event of the contractor not completing within a reasonable time, would the provision for penalties be available to the employer as a term of the new contract or not? The cases cited in illustration of the propositions contained in the passage which I have transcribed are *Legge* v. *Harlock* (12 Q. B. 1015), *Macintosh* v. *Midland Counties Railway Company* (14 M. & W. 548), and *Thornhill* v. *Neats* (8 C. B. N. S. 831). In the first and second of these three cases there was a contract under seal which purported to provide for the events which happened, and the judgment of the Court in each case was substantially confined to the construction of the covenants contained in the deed. In the case of *Thornhill* v. *Neats* there was an agreement not under seal, and it was decided that

a replication which alleged that the delay of the contractor was caused by the extra work which was the subject of a subsequent agreement, and which the employer well knew at the time of making the subsequent agreement would cause the work comprised in the original agreement to be delayed beyond the time specified for its completion, and that all the work under both agreements had been performed in a reasonable time, was a good legal answer to a counter claim for penalties to complete the work of the original contract within the time fixed for it. This case is not a direct authority upon the question whether a substituted contract which provides for additional work will in all circumstances be held to incorporate or repeat a provision of the original contract for the payment or deduction of penalties in default of performance within a specified period, and to attach it to the implied condition of the new contract that the whole work shall be completed within a reasonable period; but considered in connection with other cases, to which I shall refer hereafter, it may be found to be helpful in the solution of the question.

A similar uncertainty of statement in reference to this question will be found in Hudson's Law of Building Contracts, in which the subject of penalties is very fully discussed, and American and Australian cases are cited in addition to the reported English decisions upon it. On page 148 (vol. I, 2nd edition), it is stated that 'Where a special contract to perform specified work in a specified time has been abandoned or altered, and a new contract in general terms is made, an implied contract arises to do the rest of the work on such terms of the former contract as are implied in new contract; but special terms, such as forfeiture, will not be implied into the new contract.' The principal case cited in illustration of this proposition is the Canadian case of *Hamilton* v. *Moore* (33 Upper Canada Q. B. 520), in which it was held that a provision for the payment of fifty dollars per week as liquidated damages in default of completion within a specified time was not incorporated into a new and substituted contract, under which the work was commenced after the time fixed for completion by the original contract had expired, and was not applicable to the implied condition of the new contract that the work should be performed within a reasonable time. The case of *Holme* v. *Guppy* (3 M. & W. 387) is also cited with other English cases in illustration of the same proposition. Again, on page 238, it is stated that the general rule is that 'When the employer orders alterations and departures from the specification, or extra works not provided for by the contract, the builder is released from his obligation to perform by a stated time'; but to this statement the writer adds, 'at all events *pro tanto*, and

proportionately to the delay thereby occasioned.' What do the additional words mean? Do they mean that the contractor is to be allowed sufficient additional time to perform the extra work, and that after the expiration of such additional time the provision as to penalties is to commence to operate? The cases cited in illustration of the text are *Russell* v. *Sa da Bandeira* (13 C. B. N. S. 149), *Westwood* v. *Secretary of State for India* (11 W. R. 261), and *Holme* v. *Guppy* (3 M. & W. 387); and on the next page (239) the case of *Macintosh* v. *Midland Railway Counties Co.* (14 M. & W. 548) is cited in support of the statement that in cases in which prevention of performance within the specified time is caused by the execution of extra work ordered by the employer the builder should be released *pro tanto*. But none of the cases cited supply a direct answer to the question whether in a case in which additional work has been performed a provision for the payment of penalties in default of performance within a specified time will remain inoperative until the expiration of a sufficient additional time to perform the additional work ordered by the employer, and then become operative in regard to any unnecessary delay.

On page 401 the case of *Kemp* v. *Rose* (1 Giff. 258) is cited in support of the statement that 'the penalties cannot begin to run if there is no time fixed for completion.' But in that case the date of completion was left blank in the written agreement, and the Court refused to allow the date to be supplied by oral testimony. On the same page it is stated that 'a builder may be released from penalties if there is evidence of an extension of time, or a new implied contract to complete within further time, which, in the absence of any express contract, would mean a reasonable time.' This is the most definite attempt made in the book to answer the question whether a provision for the payment of penalties in default of performance within a fixed time will be incorporated into a substituted contract in which a condition to complete within a reasonable time is implied by law; but no cases are cited in support of the statement on the page where it occurs, and it is expressed in the potential mood, so that the reader is left in doubt whether it enunciates a fixed or a variable rule. On the next page (402) it is stated that 'where additional time is agreed to be allowed for delay caused by additional works, or other delays of the employer, the contractor is not released from payment of the penalties, but merely entitled to recover damages equal to the penalties during the period of delay by the employer, if he completes in a reasonable time.' The cases cited in support of this statement are *Legge* v. *Harlock* (12 Q. B. 1015) and *Thornhill* v. *Neats* (8 C. B. N. S. 831). In the case of *Legge* v. *Harlock* there was only

the one original contract which provided for extra work; but in the case of *Thornhill* v. *Neats* a second and substituted contract was alleged in the second replication, which was held to be a good answer in law to the counter claim for penalties; and if the last-mentioned case is an authority for the proposition that a provision in a contract not under seal for the payment of penalties in default of performance within a specified time continues in force after extra works, which necessitate delay in completion of the contract, have been agreed upon by the parties, it must be categorically distinguishable in its facts from cases like *Hamilton* v. *Moore* and *Holme* v. *Guppy*, and it is clearly contradictory of the proposition that a builder 'may be released from penalties by evidence of a new implied contract to complete within a reasonable time,' if 'may' is to be read as equivalent to *will*. The case of *Hamilton* v. *Moore* is also cited in Sedgwick On Damages (vol. I, page 611) as an illustration of the proposition that 'a stipulation for liquidated damages in a contract is to be strictly construed.' But this proposition does not necessarily preclude the incorporation or repetition of a provision fixing the amount of damages per day or per week for inexcusable delay in performance in a substituted contract. It therefore becomes necessary to consider the facts in the several cases cited by the text-writers in support of the various propositions to which I have directed attention, in order to ascertain whether all of those cases are illustrative and confirmatory of the same proposition, or are divisible into distinct classes illustrative and confirmatory of distinct but consistent propositions.

In the case of *Hamilton* v. *Moore* the subject-matter of the contract was a quantity of iron work which was to be supplied and fixed by the plaintiff upon a building to be erected by the defendant, and the defendant did not have the building sufficiently advanced to receive the iron work until nineteen days after the date on which the plaintiff had agreed to complete his contract to supply and fix it. The plaintiff commenced to fix the iron work as soon as the building was ready for it, but he subsequently committed a breach of the implied condition that he would complete the fixing of it within a reasonable time after he was able to commence it, and the Court held that the provision in the original contract for the payment of fifty dollars per week as liquidated damages for any delay in performance beyond the time specified for completion was not incorporated into the new contract under which the work was commenced after the time specified in the original contract for its performance had expired.

In the case of *Holme* v. *Guppy* the plaintiffs agreed to supply and fix the carpenter's work for a brewery belonging to the defendants

within four and a half months from the date of the agreement, and to forfeit to the defendants £40 per week for each week during which the completion of the work should be delayed beyond the time stipulated for its performance. The defendants were not able to put the plaintiffs in possession of the building until four weeks after the date of the agreement, and the plaintiffs were subsequently delayed a week in the performance of their contract by the fault of their own workmen and four weeks by the default of workmen employed by the defendants. In these circumstances the Court held that the work had been performed under a substituted contract into which the provision of the original contract for the payment of penalties for delay in performance was not incorporated.

In the case of *Russell* v. *Sa da Bandeira* it was found as a fact by the arbitrator that the delay in completion of the contract was caused by the employer and his agent, and was not attributable to any fault on the part of the plaintiff, and the Court held that the plaintiff was exonerated from the payment of any penalties for delay in the performance of his contract.

These three cases, therefore, come within the rule which was declared by Erle C.J., in his judgment in *Russell* v. *Sa da Bandeira*, to have been pronounced in *Holme* v. *Guppy*, viz. 'that where a contractor undertakes, under pain of a certain penalty or forfeiture, to perform a work within a given time, and the performance within the time is prevented by the act of the party with whom he contracts, the contractor is exonerated from the penalties.' In the case of *Thornhill* v. *Neats* the demurrer admitted the allegation contained in the second replication to the fourth plea, viz. that the delay in completion had been wholly caused by the execution of the additional work performed at the request of the defendant and which he well knew at the time he ordered it would delay the completion of the contract beyond the time specified for it; and in the case of *Legge* v. *Harlock* the demurrer admitted the allegations of the defendant's plea that a period of nine days was a sufficient time for the performance of the extra work, and that the contractor had delayed the completion of the extra work for a period of twenty-two days longer than the time necessarily required to complete it, and the Court held that the provision for penalties commenced to operate at the expiration of the additional period of nine days which the defendant's plea alleged to be sufficient for the performance of the extra work. The contention of the plaintiff's counsel was that under the agreement for the performance of the extra work the provision for penalties was discharged as soon as the date originally fixed for the completion of the contract without extras had been

properly and necessarily exceeded in the execution of the additional work, and further that the provision for penalties attached only to the covenant to complete at a fixed date, and could not be extended to the proviso for allowing so much time as might be necessary for doing additional work. During the argument Denman C.J. inquired of counsel for the defendant whether there was any case in which the Courts had extended the liability to a penalty where a change had been made in the time for performance, and it was admitted that there was not any direct authority upon the point. The judgment in this case may therefore be regarded as the first reported decision upon the question whether a provision for the payment of penalties for failure to perform within a fixed time can be extended to a failure to perform within a reasonable time; and there is not any conflict between it and the judgment in the case of *Kemp* v. *Rose*, in which the date for the completion of the contract was left blank in the agreement and the Court refused to allow it to be supplied by parol evidence. In the case of *Kemp* v. *Rose* the contractors had expressly agreed that no alterations or additions should supersede the conditions for the completion of the whole of the works, and that if the alterations or additions that might be made by the architect should require it, they would increase the number of their workmen in order to complete the whole of the work on or before a date which was left blank in the agreement. The defendants alleged that the contractors had been told verbally the day fixed for the completion of the building, but the Vice-Chancellor regarded the evidence on that point as unsatisfactory and insufficient to introduce an additional term into a written contract. He also stated that 'in all that relates to penalties the Court exercises a very nice and scrupulous judgment'; but there is nothing in his decision to indicate that in an action for damages for not completing within a reasonable time the jury might not be properly directed to assess such damages as would be legally recoverable upon the facts at the same rate per diem or per week, as the case might be, as that at which the parties themselves had assessed them in anticipation in their agreement.

An action was tried a short time ago in the colony in which I write wherein the plaintiff sued to recover damages payable to him under a written agreement by which the defendant undertook to make certain repairs to a ship within a period of forty-eight days, and to pay a penalty of £5 per day for every day during which the repairs remained unfinished after the expiration of that period. The defendant pleaded (*inter alia*) that he had failed to complete the repairs within the stipulated time in consequence of certain additions and alterations directed by the plaintiff to be performed

on the said ship and agreed to by the defendant, which said additions and alterations rendered it impossible, as the plaintiff well knew, for the defendant to complete the said repairs and to supply the said additions within the stipulated time. The jury found that the defendant had delayed the completion of the repairs for several months beyond a period reasonably necessary to complete the whole of the work performed by him under the enlarged contract, and the judge directed the jury that if they found that the plaintiff was entitled to a verdict, the damages should be assessed at £5 per day for every day that the repairs and additions had been unnecessarily and unreasonably delayed. Exception was taken to this direction on the ground that the provision in the original contract for the payment of a penalty of £5 per day for failure to perform within the stipulated time was not incorporated into the new and enlarged contract which included the additional repairs and alterations, and a rule nisi for a new trial was obtained; but the case was comprised and the rule was discharged. I am of opinion that the ruling of the judge was correct for the following reasons.

It has been settled law since the judgment of Denman C.J., in *Goss* v. *Lord Nugent* (5 B. & Ad. 58), that after an agreement has been reduced to writing it is competent for the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the previous agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement. The defendant by his pleas set up a new agreement under which additional repairs beyond those specified in the original contract were to be executed by him, and which to the knowledge of both parties made it impossible that the whole of the repairs should be completed within the time fixed by the original contract. To this new agreement the law attached the condition that the whole of the repairs should be executed within a reasonable time. The new agreement, as alleged by the defendant, was substituted for the original contract, and was partly written and partly verbal. The written part of the new agreement consisted of so much of the original contract as was not abrogated or annulled by the verbal portion of the new agreement. In the original contract there was a stipulation that the repairs which were the subject-matter of that contract should be executed within a period of forty-eight days. There was also a stipulation that if the defendant did not complete those repairs within the time fixed for their execution, he should pay to the plaintiff a penalty

of £5 per day for every day they remained unfinished after the expiration of that period. But it was not necessary to fix a time for the performance of the original contract in order to give the plaintiff a right of action for damages if the performance of it was delayed beyond a necessary and reasonable time. Nor was it necessary that the contingent damage to be sustained by the plaintiff from the failure of the defendant to execute the repairs within the stipulated time should be assessed in anticipation in order to enable the plaintiff to claim compensation for delay in performance. Without either of those stipulations the plaintiff would have had an enforceable claim for damages under the original contract if he sustained any loss by the default of the defendant to complete the repairs within a reasonable period. But if both stipulations had been absent from the original contract, and the plaintiff had suffered loss by reason of any culpable delay on the part of the defendant, a jury would have been required for the double purpose of fixing the time within which the repairs ought to have been properly and reasonably completed, and the amount of compensation payable to the plaintiff by the defendant for his delay in executing them. The parties, however, chose to insert both stipulations in the original contract, and if the Court should hold that the penalty of £5 per day was payable as liquidated damages, then the task of the jury would be limited to ascertaining the number of days over which the delay in performance had extended, and calculating the sum that would be produced by multiplying the daily penalty by the number of days for which it was payable. But it was equally competent for the parties to have inserted either of the stipulations without the other of them, and to have left either the question of the damage sustained by the plaintiff or the proper time within which the repairs should have been executed to be determined by a jury. By the new contract, as it was alleged in the defendant's pleas, the stipulation in the original contract that the repairs therein mentioned should be completed within forty-eight days was annulled, and a condition that the whole of the repairs comprised in the new contract should be completed within a reasonable time was substituted for it by implication of law. The defendant also pleaded that after the making of the original contract, and before any breach of it, the plaintiff exonerated and discharged the defendant from his agreement to pay a daily penalty for delay in performance. But no evidence was given of any express waiver or annulment of the stipulation to pay penalties. Therefore if the defendant had been exonerated and discharged from that stipulation as he alleged, he must have been relieved of his obligation by operation of law upon

the making of the new contract. But if the original contract had not contained any stipulation for the performance of it within a fixed period, but had provided that any damage sustained by the plaintiff in consequence of unnecessary delay by the defendant in the execution of the work to be done under it should be assessed at £5 per day, could it have successfully contended that the subsequent agreement of the parties to enlarge the subject-matter of the contract operated as an annulment of that provision?

In such cases as *Holme* v. *Guppy* and *Hamilton* v. *Moore*, in which a definite time has been fixed for the performance of the contract and the contingent damages to the employer from any culpable delay by the contractor have been assessed in anticipation, and the contractor has been delayed or obstructed in the performance of the contract by the default or wrongful conduct of the employer, the contractor is relieved of his obligation to perform the work within the stipulated time, and is also relieved from the stipulation which assesses in anticipation the contingent damages to be sustained by the employer from the contractor's delay in performance, because the stipulation which anticipatorily assesses such damages must be construed in reference to an obligation voluntarily accepted by the contractor, either by express agreement or by implication of law. But the only obligation which the contractor in such a case has either expressly or impliedly accepted, and to which the stipulation assessing damages could extend, is the obligation to perform the work within a fixed period, from which he has been discharged by the default or wrongful act of the employer. If he enters upon the execution of the work or continues the performance of it after he has been relieved of the obligations to complete it within the specified time by the default or wrongful conduct of the employer, he is held to undertake to complete the work in a reasonable time. But at the time he is assumed in law to undertake that obligation, the stipulation assessing damages for delay in performance is non-existent, because it referred expressly and only to the other stipulation for completion within a specified period from which the contractor had been previously discharged. The liability to pay damages under a contract must always depend upon a previous obligation upon the breach of which the liability arises; and, if the only obligation in reference to which the liability is accepted is annulled and another obligation is not simultaneously substituted for it, either by the express agreement of the parties or by implication of law, the possibility of liability ceases. But in the case of a new contract made by the alterations or enlargement of an existent contract, before any breach of it has been committed by either party, the abrogation of a stipulation in the original contract

that the work should be completed within a fixed time is simultaneously accompanied by the creation of whatever other obligation is substituted for it, either by the express agreement of the parties or by implication of law, in regard to the time within which the new contract is to be performed; and if another fixed period is not expressly agreed upon by the parties, the law attaches the obligation that the contract shall be executed with due dispatch and completed within a reasonable time. In all such cases the parties may be fairly presumed to have included in the new contract everything contained in the original contract which has not been expressly or by necessary implication annulled by the additional terms of the new contract. Then upon what grounds can it be logically contended that the parties in such a case intended that the stipulation anticipatorily assessing the contingent damages to the employer from culpable delay in performance by the contractor should be annulled? It cannot be assumed that such a stipulation will necessarily be regarded by the employer on the one hand as of less importance to him in relation to the new contract than it was in relation to the original contract, or by the contractor on the other hand, as more detrimental to him in relation to the new contract than it was in relation to the original contract. If the damages were fixed at a manifestly low rate, the stipulation would be more advantageous to the contractor than an indefinite liability to pay whatever damages might be actually sustained by the employer from a protracted delay in performance. The obligation of the contractor to perform the new contract within a reasonable period is as unquestionable and as enduring as was his obligation under the original contract to perform within a fixed period; and there is not any rule of law which precludes the parties in such a case from assessing in anticipation the damages to be sustained by the employer from a breach of that obligation by the contractor. The case of *Legge* v. *Harlock* is an authority directly contradictory of any proposition which alleges existence of any such rule; and in all the other cases to which I have directed attention, and in which the provision for payment of penalties, in the event of delay in performance, has been held to have been waived or annulled, the contractor has been discharged from his obligation to complete within the stipulated time by the conduct of the employer, in accordance with the well-established maxim that the performance of a condition is excused by any default of the obligee which prevents or delays its fulfilment. Those cases therefore belong to a class which is clearly distinguishable from the cases in which the parties, before any breach of the original contract, mutually agree to substitute for it a new contract which varies and adds to the

terms and conditions of the original contract. In all such new contracts the parties are perfectly free to include an enlarged period for performance in express terms, and if another fixed period is substituted for the period named in the original contract, it would seem impossible to contend that it had no reference to the stipulation for the payment of penalties for delay; but in the absence of an express inclusion of an enlarged period for performance in the new contract, the parties are assumed to enter into it with a full knowledge that a condition to perform within a reasonable time is inserted by implication of law, and that a breach of that condition will confer a right of action for damages. They have previously agreed to assess such damages in anticipation in regard to the period fixed by the original contract for performance. Upon what legal or logical principle can they be held to have not had any desire or intention to assess such damages under the new contract?

A. Inglis Clark
(Justice of the Supreme Court, Tasmania).

THE NEAR FUTURE OF LAW REFORM.

I. The Master-machine.

TWENTY-FIVE years have passed since the Judicature Act of 1873 came into operation, but measured by the expansion of ideas that legal Revolution—for it was nothing else—is at least a century behind us. The Act was of course a compromise. No scheme of such magnitude, affecting so many interests and, in some matters, arousing party feeling, could be carried through Parliament in its entirety. Some therefore of its most valuable provisions had to be 'jettisoned' to save the rest.

Judging from the discussions which have taken place during the last ten or fifteen years in the *Times*, and in the legal and other journals on the subject of Law Reform and matters germane to it, it would seem that the time is ripe, or fast ripening, for another move forward—a movement which, for many years to come, shall place the administration of the Law on a businesslike footing which shall commend itself to the lawyers and laity of the twentieth century. The public, in short, expect and are justified in expecting in the near future a generous, enlightened, adequate scheme of Law Reform, and this must include not only a 'Judicature Act' which shall consolidate, amend, and supplement its dozen predecessors, but the establishment of a suitable, permanent machinery, by means of which the Law and its administration may be constantly overlooked, put in good working order, and so maintained.

This would involve two Government measures, the first of which should be the creation of a 'Department,' or Ministry of Justice; for it is time to give to the Law the advantages already given to Agriculture, and about to be extended to Education. This Master-machine being provided would produce, in due course, its first great fruit, the Judicature Bill of 19—, and the Act would follow.

All the great Departments of the State are provided with a more or less efficient organization, by means of which the duties entrusted to them are carried out. The details of this organization differ in different offices, but in all cases the main features are the same, namely, a political chief; a permanent head; a 'Board' or Council of experts, to which the political chief can look with confidence

for advice upon all official matters; and a parliamentary secretary, 'for nothing is more helpless than a Department which has no official defender'; and a sufficient clerical staff. By such an arrangement the political chief is freed from the troublesome minor details of the Office, and is enabled to give the whole of his energy and attention to the policy of his Department. The country has always recognized the necessity and usefulness of such equipments, and has provided a liberal purse for their support; for instance, Admiralty gets its £261,000, Agriculture its £105,000, Local Government its £197,000, and so on.

Let us consider the provision made for the supervision of the administration of Justice in England.

The Lord Chancellor of the day is the political head of the Law. Every matter, even the most trivial, which in any way affects either the administration of the Law or its substance, must pass through his hands and is subject to his control. Upon the shoulders of this one official rests the entire responsibility for everything connected with the Law and its chief officers. Those who can form an adequate idea of the vastness of the region to which this responsibility extends, will understand what the practical outcome of such an arrangement must inevitably be. A task which would tax to the utmost the energies of the most strenuous and robust of men, even if assisted by a Council and an ample staff, is imposed upon one individual. But the supervision of the Law and its officers is only a part, and not the largest part, of a Chancellor's duties. He is a Judge of the Final Court of Appeal. He has to peruse and sanction all rules of procedure, not only those of the Supreme Court, but those of the County Courts and those made under innumerable statutes. He is speaker of the House of Lords, and is one of the chief expounders and defenders of the ministerial policy. He is the patron of many livings, and practically all the Judges, County Court Judges, and Justices of the Peace, are appointed by him. For the discharge of these manifold duties the minister is provided with a permanent secretary, two private secretaries, and certain ceremonial officers at a cost of about £3,000 a year! It is obvious that no official can hope with such assistance as this to discharge these multifarious and most important duties, either to his own satisfaction, or to the public benefit. If he should be so ill-advised as to attempt the impossible, the result would be, to the individual loss of health, or life, and to the country, much valuable service. The intolerable burden of this office is vividly described by the late Lord Herschell in an address to certain Justices of the Peace in the *Times* of November, 1893.

How such a mass of heterogeneous duties, judicial, ministerial,

and legislative, came to be imposed upon one official, is a matter of history, of the history of England. The thing has grown gradually up in earlier and easier times, and in the casual, haphazard, adventitious way so characteristic of our institutions. If the holders of this office have done, as they undoubtedly have, good work and prevented an utter collapse, it is due to the zeal and energy of the chief and his staff, not to the efficiency of the means at their disposal. Few will deny that for the work now, and in the future to be done, the machinery, if it can be so called, now existing is feeble, discredited, and obsolete, and that the time has come for its reconstruction upon a far more liberal and enlightened basis.

The analogy of the great Government Offices, and the example of European States, suggest the groundwork of such a re-construction, the outline of which might be somewhat as follows:—

A Ministry, or Department, of Justice. This department would be concerned with civil justice only; the Home Office would, at any rate, until the time shall arrive for a general survey of the whole work of the Government Departments and the adoption of a uniform plan, continue to deal with criminal justice and the police.

A Minister of Justice, the Lord Chancellor.

A Board or Council. This might conveniently consist of two branches, one acting as a 'Consultative Committee,' part as it were of the personal staff of the Chancellor, and consisting of the Permanent Secretary and the Attorney and Solicitor-General. These latter officials might also perhaps undertake the important duties discharged in other offices by the parliamentary secretaries. The other branch of the Council would act as a 'Committee of Advice,' and should be composed of the Presidents and Vice-Presidents of the Council of the Bar, of the Incorporated Law Societies of London and some other principal towns, and of the principal Chambers of Commerce.

The functions of this 'committee of advice' would be to inform the mind of the Chancellor upon matters submitted to it through the Permanent Secretary, and further to bring before the Chancellor everything connected with the administration of justice which it might consider a fit subject for his consideration. The services which such a committee could render to their chief would be of the utmost value. It would act as an 'Intelligence Department,' keeping the office in full touch with the country. Not only would the members of it be themselves men of great skill and experience in matters connected with their professions, but they would have always at their disposal, when they should think it desirable to ask for it, the wealth of expert knowledge possessed by the societies over which they presided.

It is difficult to imagine a more effective instrument for discovering and remedying defects in the law and its administration than this; for the State would practically obtain, at a trifling cost, the assistance of three admirably organized societies, all ready for action, and adequately representing the views of the legal and business communities. It would, probably, be rarely necessary that this 'committee of advice' should meet, as the bulk of their business could be settled by correspondence.

It would be, no doubt, necessary to increase the secretarial and clerical staff, for the purpose of assisting the Permanent Secretary in the routine work of the department, which would be largely increased, and the Chancellor should have the power, with the consent of the Treasury, of providing and paying such persons as might be required for carrying out legal work sanctioned by the department, and who could not be conveniently recompensed by the exercise of the official patronage.

Suppose then that a 'master-machine' has been created, either in the way indicated or in some other—for details matter little if the great object of giving strength and energy to the driving-wheel is accomplished. Its first work would, we have supposed, be the preparation of the Bill on which the Judicature Act of the new century is to be founded. The department would have in its own hands everything, or nearly everything, necessary for that purpose. It would be able, as has been shown, to command the assistance not only of the entire legal profession, but of the ablest men of business outside it. If perchance there should be any especial subject upon which it required assistance, it could readily get it through a Parliamentary Committee. But there is not, in fact, any question connected with the law and its administration which the expert assistance, at the disposal of a department so constituted, could not readily deal with. The Bill, it must be remembered, would deal with the administration of civil justice only, and every point upon this subject is known and has been discussed a thousand times, and there is really nothing upon which an accumulation of Blue-books could throw any useful light.

The first work of the Council being put in hand, the 'committee of advice' might be trusted to set speedily to work on other pressing business. There is an ample supply of professional talent waiting for employment, and there is an inexhaustible amount of material upon which it can be most usefully employed. Under the new conditions these would be brought together, and we might expect that each year would see many consolidating statutes drafted, and a nearer approach made to the inevitable code, and many other schemes carried out which have long lain dormant.

Thus the early years of the century would see the beginnings of a thorough, trenchant, far-reaching system of law reform, not transitory but permanent.

Let us try and imagine how this 'department' would deal with any difficult question which it had to face, such for instance as the holding of assizes and sessions. The Permanent Secretary, at the request of the Chancellor, would send to the 'committee of advice' a series of questions, requesting it to report thereon. The committee would, in a case of such difficulty, call meetings of their respective societies, and debates would ensue. In the result this committee would make a joint report to the Chancellor, who would consider it, with the aid of the persons whom for distinction's sake we have called the 'consultative committee,' and certain conclusions would be come to. Then these conclusions might be again considered by the entire Council, and finally might be submitted to the Judges. The scheme when finally settled would be drafted under the supervision of the Attorney and Solicitor and brought before Parliament.

The action of Parliament is uncertain, but it is likely that a measure so prepared, and backed by such an overwhelming weight of expert authority, would pass without serious opposition. Such a method of proceeding would be (*pace* Mr. Montague Crackanthorpe) cheaper, speedier, and at least as effective as a Royal, or any other, Commission.

There is the question of 'Patronage,' the most onerous of all the burdens which a Lord Chancellor is called upon to bear. Its exercise may seem to possess some few advantages, but the drawbacks are far more numerous and weighty. The ceaseless importunity of a crowd of political, social, and professional acquaintances, not always scrupulous or delicate in the means which they employ, must cause disgust and irritation. For one person gratified and grateful, a hundred often are disappointed and filled with resentment. The position is an intolerable one, and the system faulty. It exposes men to influences which operate most powerfully on those who are the most genial and kindly-natured, and if they yield to the most amiable of human weaknesses, they are denounced. Many have desired to be relieved from their thankless task, and herein the Council proposed might be made of service. Thus when any vacancy occurred the 'committee of advice' would furnish their chief with a list containing a certain number of names, and from these his choice would be made. Probably in such cases the Committee would consult the Council of the Bar, or the Incorporated Law Society, or both, as the circumstances might suggest. The Chancellor would in this way be relieved from unseemly

pressure, whilst the privileges of his office would be substantially untouched. Such an attempt, however, to relieve the Chancellor at the expense of the Government is not likely to be attempted in the near future.

The cost of such a department would not be worth consideration, even if it were likely to be considerable. But this would not be the case. Even if the members of the 'committee of advice' required any remuneration, it would probably be limited to such a sum as would secure them and their societies from being out of pocket. The secretarial and clerical staff, &c., would require to be strengthened, and provision made, as before suggested, for work done by legal experts. But beyond this there would be little, and probably £10,000 a year would suffice to commence with. But the question is not one of cost. For necessary work well done the nation does not haggle about cost. If the Government would create and equip a practical businesslike Department of Justice, it would have no difficulty, even in these times, in getting any money that might be required.

THOMAS SNOW.

NEGOTIABILITY AND ESTOPPEL[1].

ALL first-examination students ought to be ruthlessly plucked if they cannot tell what a 'negotiable' instrument is, and whence its peculiar characteristics were derived; for the text-books make it clear enough to them that—

'Bills of exchange and promissory notes . . . are by the law-merchant negotiable in both senses of the word. The person who . . . becomes holder may sue in his own name on the contract, and . . . he has a good title notwithstanding any defect of title in the party . . . from whom he took it[2].'

The ordinary common law doctrines were thus completely antagonized by the provisions of the law-merchant; for as Mr. Justice Byles says[3]:—'The object of the law-merchant as to bills and notes . . . is to secure their circulation, therefore honest acquisition confers title. To this despotic, but necessary principle, the ordinary rules of the common law are made to bend.'

Or, as Baron Wilde puts it[4]:—'The law-merchant validates in the interest of commerce a transaction, which the common law would declare void for want of title or authority.'

And if we ask the cause of this divergence between the two laws, Mr. Bigelow supplies the answer[5]:—'It is here that the law-merchant appears in its strongest colours, and in its most striking contrast to the common law. It is *negotiability* that affords the colouring and the contrast.'

So run the text-books; and perfect familiarity enables us to repeat the language not only without criticism, but without a suspicion of the possibility of incorrectness. Are not these things among the very fundamentals of the law? Well, it will do little harm to inquire.

[1] This article, together with former articles by the same writer in the LAW QUARTERLY REVIEW on 'Priorities in relation to Estoppel' (L. Q. R. xiii. 46, 144) and 'Estoppel by Negligence' (L. Q. R. xv. 384), is adapted from part of a forthcoming work on 'Estoppel by Misrepresentation.'

[2] Per Blackburn J. in *Crouch* v. *Crédit Foncier*, 1873, L. R. 8 Q. B. 374, 382; 42 L. J. Q. B. 183. Quoted approvingly in Pollock on Contracts, 6th ed., p. 219; Chalmers on Bills, 5th ed., 103; McLaren on Bills, 197, 445; Cababé on Estoppel, 130; Addison on Contracts, 9th ed., 1096. And see Bouvier's Law Dict. (Rawle), tit. Negotiate. To same effect, per Bowen L.J. in *Simmons* v. *London Joint Stock Bank* [1891] 2 Ch. at p. 294; 60 L. J. Ch. 324.

[3] *Swan* v. *N. B. A.*, 1863, 2 H. & C. 185; 32 L. J. Ex. 273.

[4] *Swan* v. *N. B. A.*, 1862, 7 H. & N. 634; 31 L. J. Ex. 436.

[5] On Bills and Notes, 206.

I. *Transferee suing in his own name.*—The first of these distinguishing characteristics of bills and notes—that a transferee can sue in his own name[1]—is very easily displaced, and that in four different ways:—

(1) Assignees of covenants 'running with the land' could, and can, sue upon them in their own name[2]. This was not because of any law-merchant or law-farmer, but because the covenant was made with the person who for the time being had the land. That is to say, the covenant was ambulatory.

(2) It was for the same reason, and not because the law-merchant so declared (an absurd idea) that the transferee of a note could sue upon it in his own name:—

'The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note *bonâ fide*, not by virtue of any assignment of the promise, but by *an original and direct promise moving from the maker to the bearer*[3].'

(3) All choses in action may be sued upon in equity in the name of the transferees of them. The characteristic in hand, therefore, is that of the courts of law, rather than that of certain choses in action; and that which has been spoken of as a distinguishing characteristic of bills and notes is really but a point of practice, upon which different courts take opposite views[4].

(4) Whatever may be thought of these three points, it will not be doubted that in many jurisdictions modern statutes have abolished all distinctions between 'negotiable' instruments and other choses in action (arising out of contract), with reference to the right of assignees to sue upon them in their own names. All transferees may now so sue.

As to this first characteristic, then, we may say either that it never existed, or that if it did, it has been abolished.

[1] In a noteworthy judgment in *Shaw* v. *Railroad* (1879, 101 U. S. 557) Strong J. contends that 'the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability.' The acquisition of a better title than that of the transferor he treats as a consequence of this capability.

[2] *Onward Building Society* v. *Smithson* [1893] 1 Ch. 6, 7; 62 L. J. Ch. 138; *Mitchell* v. *Warner*, 1825, 5 Conn. 498; *Tapscott* v. *Williams*, 1841, 10 Ohio 443; *Spencer's Case* and notes, 1 Sm. L. C. 8th ed. 106 ff.

[3] Per Story J. in *Bullard* v. *Bell*, 1817, Mason 243. And see *Reed* v. *Ingraham*, 1799, 3 Dall. 505 (Pa.); and *Thompson* v. *Perrine*, 1882, 106 U. S. 593.

[4] That the point was one of practice becomes very clear when it is remembered that although an assignee of a chose in action was not permitted to sue at law in his own name, yet his real presence was acknowledged when suing in the name of his assignor. To a defence valid as against his assignor, it was sometimes a good replication that the plaintiff was suing as a trustee for the assignee, who was therefore the real plaintiff. In other words, courts of law allowed transferees to assert their rights *through* their trustees, whereas equity permitted the same thing to be done directly. See *Master* v. *Miller*, 1791, 4 T. R. 340, judgment of Buller J. *passim*.

II. *Honest acquisition confers title.*—It is very extraordinary that it should ever have been said that a distinguishing characteristic of 'negotiable' instruments was that honest acquisition of them confers title. Consider these points:—

(1) A 'negotiable' instrument is a 'negotiable' instrument whether it is due or overdue; and yet honest acquisition of it at one stage of its career will (generally) confer title, but when it passes a certain age an honest transferee takes what is given him and no more [1].

(2) Again, it is not true even of current instruments that honest acquisition will always confer title; for it will be of no assistance if the signatures to them have been obtained by certain frauds [2]; or if the amount payable has been fraudulently increased [3]; or if the signature to a blank piece of paper has been stolen, and converted into a bill [4]; or if even a completed, but unissued, bill be stolen [5]; or if a material alteration has been made in a bill [6]; or in many other cases [7].

(3) Nor can it be said that the 'honest acquisition' doctrine is confined to 'negotiable' instruments, for there is the ever-widening class of cases provided for by that most important rule:—

'Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield, when it appears from the nature or terms of the contract that it must have been intended to be assignable free from, and unaffected by, such equities [8].'

[1] 'Where an overdue bill is *negotiated*, it can be *negotiated* only subject to any defect of title affecting it at its maturity': 45 & 46 Vict. (Imp.) c. 61, s. 36 (2); 53 Vict. (Can.) c. 33, s. 36 (2).

[2] *Foster* v. *McKinnon*, 1869, L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Second Nat. Bank* v. *Hewitt*, 1896, 59 N. J. L. 57; 34 Atl. Rep. 988.

[3] *Schofield* v. *Londesborough* [1894] 2 Q. B. 660; 63 L. J. Q. B. 649; [1895] 1 Q. B. 536; 64 L. J. Q. B. 293; [1896] A. C. 514; 65 L. J. Q. B. 593.

[4] Byles on Bills, 15th ed., 255; Daniel on Negotiable Instruments, s. 814; Parsons, N. & B. vol. 1, 114.

[5] *Bazendale* v. *Bennett*, 1878, 3 Q. B. Div. 525; 47 L. J. C. P. 624; Bigelow on Bills and Notes, 177, 178, and cases there cited. But see per Williams J. in *Ingham* v. *Primrose*, 1859, 7 C. B. N. S. 82; 28 L. J. C. P. 294.

[6] *Calvert* v. *Baker*, 1838, 4 M. & W. 417; *Desbrow* v. *Wetherly*, 1834, 1 Moo. & R. 438; *Crotty* v. *Hodges*, 1842, 5 Sc. N. R. 221; 4 M. & G. 561; 11 L. J. C. P. 289; *Burchfield* v. *Moore*, 1854, 23 L. J. Q. B. 261. See the codes, 45 & 46 Vict. (Imp.) c. 61, s. 64; 53 Vic. (Can.) c. 33, s. 63. *Middaugh* v. *Elliott*, 1 Mo. App. 462; *Kingston Sav. Bk.* v. *Bosserman*, 1893, 52 Mo. App. 269; *Newman* v. *King*, 1896, 54 Ohio St. 273; 43 N. E. Rep. 683. But see *Mt. Morris Bk.* v. *Lawson*, 1894, 27 N. Y. Sup. 272.

[7] *Master* v. *Hill*, 1793, 4 T. R. 320; 5 T. R. 367; 2 Hy. Bl. 140; 2 R. R. 399; *Mason* v. *Bradley*, 1843, 11 M. & W. 593; 12 L. J. Ex. 425; *Harrison* v. *Cotgreave*, 1847, 4 C. B. 562; 16 L. J. C. P. 198; *Warrington* v. *Early*, 1853, 2 E. & B. 763; 23 L. J. Q. B. 47; *Gardner* v. *Walsh*, 1855, 5 E. & B. 91; 24 L. J. Q. B. 285; *Hirschfield* v. *Smith*, 1866, L. R. 1 C. P. 340; 35 L. J. C. P. 177; *Hirschman* v. *Budd*, 1873, L. R. 8 Ex. 171; 42 L. J. Ex. 113; *Vance* v. *Louther*, 1876, 1 Ex. D. 176; 45 L. J. Q. B. 200; *Hosier* v. *Beard*, 1896, 54 Ohio St. 398; 43 N. E. Rep. 1040; *Columbia* v. *Cornell*, 1888, 130 U. S. 658; *Swinney* v. *Edwards*, 1898, 55 P. Rep. 306 (Wy.).

[8] *Re Agra and Masterman's Bank*, 1867, L. R. 2 Ch. at p. 397.

(4) The cases are legion, too, in which honest acquisition of such 'non-negotiable' articles as goods and lands will confer a better title than that held by the transferor:—

(*a*) A mortgagee allows the mortgagor to have the deeds, and they are fraudulently deposited as security for a loan. The depositee gets a better title than the depositor had [1].

(*b*) Goods entrusted to a mercantile agent may be sold, and a good title passed, although he had no interest in the goods, and no right to sell them [2].

(*c*) Any one held out as the owner of goods may transfer a better title than he has—at least the owner will be estopped from asserting to the contrary [3].

(*d*) A purchaser in market overt may obtain a better title than that of his vendor.

Negotiability and transferability.—Abandoning then these two customary significations of 'negotiability,' let us try the dictionary meaning, namely, 'transferability.' This has been adopted by some writers, but only very summarily to be departed from. For example, in 'Daniel on Negotiable Instruments,' we find it stated that [4]—'An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only.'

But the learned author approves of such language as the following:—

'Written contracts are not necessarily negotiable, simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word 'bearer' had been omitted, but they were *not negotiable* instruments in the sense supposed by the appellants. *Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owners* [5].'

Here then are documents which are transferable, but *not* negotiable. In another paragraph, referring to bills of lading, the same writer says [6]:—

'Bills of lading are generally classed among negotiable instruments and are frequently spoken of as negotiable like bills of exchange, by text-writers and by jurists of high reputation and

[1] *Perry-Herrick* v. *Attwood*, 1857, 2 De G. & J. 21; 27 L. J. Ch. 131; *Brocklesby* v. *Temperance Building Society* [1895] A. C. 173; 64 L. J. Ch. 433.

[2] The Factors Act, 52 & 53 Vict. (Imp.) c. 45, ss. 2, 7, 8, 9, 10.

[3] Ib. 2, 7, 8, 9; Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 21.

[4] S. 1. See also Smith's L. C., 10th ed., 456; and Addison on Contracts, 10th ed., 1056.

[5] *Railroad Co.* v. *Howard*, 7 Wall. 415. Quoted by Mr. Daniel. [6] S. 1727.

authority [1]. But while *they are assignable* and possess certain capacities of negotiation, which assimilate them quite closely in some respects to negotiable instruments, *they are not negotiable* in the same sense as bills of exchange or negotiable promissory notes [2]. And it is more correct to speak of them as *quasi negotiable instruments*, since they are rather like, than of, them [3].'

It would of course be quite out of the question to substitute for 'quasi negotiable' the phrase *quasi transferable*. That would be to alter Mr. Daniel's meaning, which was that although bills of lading were capable of *complete* transfer, yet that they lacked some of 'the peculiarities which attach to negotiable paper'—in other words, they are completely transferable, but only *quasi* negotiable.

Not much help is to be obtained from the codes. We find in the English and Canadian compilations that 'A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill [4].' But if we were to say that a blacksmith's account 'is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the account,' the assertion would be quite as valid, and just as fruitless. For the gist of both statements is merely that bills and accounts may both alike be transferred—a remark that, of course, does not help one to appreciate any distinction between them.

The last hope of intelligibility (upon the view that negotiability means simply transferability) seems to be removed with Mr. Joseph Chitty's perfectly accurate remark [5] that 'It is now well established that it is not essential to the validity of a bill that it should be transferable from one person to another [6].'

[1] *Lickbarrow* v. *Mason*, 1787, 2 T. R. 63, 1 R. R. 425, in which the jury found 'that by the custom of merchants bills of lading . . . to order or assigns, have been and are . . . negotiable and transferable'; *Berkling* v. *Watling*, 7 Ad. & E. 22; *Bell* v. *Moss*, 5 Whart. 189.

[2] *Gurney* v. *Behrend*, 3 E. & B. 622; 23 L. J. Q. B. 265; *Barnard* v. *Campbell*, 55 N. Y. 472; 1 Smith's Lead. Cas., 10th ed., 693.

[3] Schouler's Personal Property, 410, 605; *Davenport Nat. Bank* v. *Homeyer*, 45 Mo. 145.

[4] 45 & 46 Vict. (Imp.) c. 61, s. 31 (1); 53 Vict. (Can.), c. 33, s. 31. The codes also provide that a bill containing 'words prohibiting transfer . . . is not negotiable' (s. 8); but the codes, of course, do not mean that such a bill cannot be transferred. For as Chalmers says (on Bills, p. 129):—'A bill may be transferred by assignment or sale, subject to the same conditions as would be requisite in the case of an ordinary chose in action. Thus: C is the holder of a note payable to his order. He may transfer his title to D by a separate writing assigning the note to D; *Re Barrington*, 2 Sch. & Lef. 112, 9 R. R. 61 (1804); or by a voluntary deed constituting a declaration of trust in favour of D: *Richardson* v. *Richardson*, L. R. 3 Eq. 686 (1867); or by a written contract of sale: *Sheldon* v. *Parker*, 3 Hun. (N. Y.) 498 (1875). A bill is a chattel, therefore it may be sold as a chattel. A bill is a chose in action, therefore it may be assigned as a chose in action.'

[5] Chitty on Bills, 11th ed., 115.

[6] For example, days of grace are allowed on a note payable to A without adding

If now we say that bills are negotiable instruments; that negotiable means transferable; and that bills are very often not transferable, we have some notion of the confusion to which current phraseology has reduced us.

Summary.—We seem thus to have ascertained that we cannot ascribe to 'negotiable' instruments the exclusive possession of any of the characteristics by which they are usually said to be distinguished:—

1. Transferees of other choses in action may sue upon them in their own names.

2. Transferees of 'negotiable' instruments sometimes take subject to equities, and transferees of other choses sometimes take free from them. Purchasers of such 'non-negotiable' commodities as goods and lands often acquire better titles than those of their vendors.

3. Blacksmith's accounts are just as 'negotiable' as bills and notes—judged by their transferability.

What then is Negotiability?—The difficulties commence to dissolve as soon as it is observed that the word 'negotiable' is used in two senses. The primary meaning unquestionably is *transferable*; but consider the following sentence: 'A *non-negotiable* promissory note is a mere chose in action; as such, it is *assignable*, and the assignee thereof may maintain an action thereon in his own name[1].'

The language is in perfect harmony with our ideas; but of course it does not mean that a *non-assignable* note is assignable. In like manner, and in language which is customary, Mr. Daniel, treating of 'the *transfer* of certificates of deposit[2],' expresses doubts as to whether they are *negotiable*[3]. Stock-certificates are undoubtedly *transferable*, but Mr. Daniel says that they 'are not regarded as *strictly negotiable*, although they inure to the benefit of the bearer, and may be classed amongst instruments quasi-negotiable[4].'

The truth is that 'negotiable' has an original and an acquired signification. Originally it meant transferable; but afterwards it

'or to his order or bearer': *Smith* v. *Kendall*, 1794, 6 T. R. 123. Of a similar note it was said that 'It is not necessary that such a note should be in itself negotiable, it is sufficient that it should be a note for the certain payment of a sum of money whether negotiable or not' (per Le Blanc J. in *Rex* v. *Box*, 1815, 6 Taunt. 328); and a conviction for forgery of such a document was sustained. And see *Whyte* v. *Heyman*, 1859, 34 Pa. 143. Now by the Codes (altering the law), 45 & 46 Vict. (Imp.) c. 61, s. 8 (4), 53 Vict. (Can.) c. 33, s. 8 (4), such a note is 'negotiable.'

[1] *Barry* v. *Wachosky*, 1899, 77 N. W. Rep. 1080.

[2] On Negotiable Instruments, s. 1702.

[3] Ib. s. 1703.

[4] Ib. s. 1708. Consider also this sentence from Chalmers on Bills (5th ed.): 'The character and incidents of negotiability depend upon the time of negotiation' (p. 115).

was used to indicate the *effects* of transfer, namely, that the transferee (1) took free from equities, and (2) could sue in his own name. And thus we say that certain choses are transferable, although not negotiable—meaning that they are transferable, but that certain effects do not accompany their transfer[1].

According to primary meaning then a 'negotiable' instrument was a transferable instrument; and in that sense the word truly indicated, at one time, a real distinction among choses in action. The secondary meaning, however—that in which it is taken as indicating the existence of peculiar effects of transfer—was always inaccurate and unscientific; for as to the transferee bringing an action in his own name, that is the normal result of the transferability of a chose in action; and as to honest acquisition conferring title, this secondary meaning arrogates to the transfer of bills and notes alone an effect (1) which existed sometimes in the case of other property, and (2) which sometimes was absent from bills and notes themselves. In other words, 'negotiable' was used (in this secondary sense) to mark off bills and notes from other choses in action, by a peculiarity of which they not only had no exclusive possession, but which frequently they had not themselves. However dubious to some lawyers this assertion may appear to be, there is at least no doubt (1) that at the present day all choses in action arising out of contract are transferable; and (2) that any rule as to transferees of choses in action taking free from equities is by no means confined to bills and notes, but is, as we have seen, 'a rule which must yield when it appears from the nature or terms of the contract, that it must have been intended to be assignable free from and unaffected by such equities[2].'

We must get away, then, from the terms 'negotiable' and 'non-negotiable.' For (1) their primary and only true meaning has been lost to them; (2) that meaning would now be useful only to distinguish between choses which arise out of contract, and those which do not (for the former are by statute assignable—negotiable—and the others are not), and the word 'transferable' (having no false connotations attached to it) is better for that purpose; and (3) the acquired meaning of the terms was never scientific—at all events at the present time they are inaccurate and misleading.

[1] See the instructive judgment of Strong J. in *Shaw* v. *The Railroad*, 1879, 101 U. S. 557, in which he says: 'The capability of being thus transferred so as to give to the indorsee a right to sue on the contract in his own name is what constitutes negotiability. ... In regard to bills and notes *certain other consequences generally though not always follow*.' Ashhurst J., too, as early as 1787, had said: 'The custom of merchants only establishes that such an instrument may be indorsed, but the effect of the indorsement is a matter of law;' *Lickbarrow* v. *Mason*, 1787, 2 T. R. p. 71.

[2] Ante, p. 137.

Ambulatory and non-ambulatory.—Nevertheless, as the quotation just made sufficiently shows, there is a real distinction among choses in action (arising out of contract), namely, between those 'intended to be assignable' free from equities, and those not so intended—or, as the present writer ventures to suggest, between ambulatory and non-ambulatory contracts. All contracts are now transferable (negotiable); but some are intended to be redeemable to persons other than the immediate promisee; are intended to be passed on from hand to hand; are intended, that is, to be ambulatory.

Of such contracts there were in early times none (the simple preceded the complex), and the courts declined to acknowledge their validity long after the customary rules concerning them were well known to everybody. Foreign bills of exchange formed the thin edge of the wedge; the statute of Anne[1] overruled Chief Justice Holt in his refusal to sanction the admission of promissory notes; in 1758, a bank-note was held to be negotiable[2]; in 1764, a draft or cheque on a bank[3]; in 1781, a note indorsed in blank[4]; exchequer bills in 1820[5]; and bonds of the King of Prussia, payable to the holder, in 1824[6].

All these instruments have a common characteristic (they are intended to be ambulatory), but one that is by no means necessarily confined to them, as we shall see later on. Some members of a class must necessarily be known before the class itself can be accurately described, and non-recognition of the true distinguishing characteristic has often led to unnecessary difficulty. Thus it happened that it remained for Lord Cairns (1862), in perhaps the most noteworthy single sentence of modern law, to indicate the clear and simple ground upon which rested the asserted peculiarities of 'negotiable' instruments. It is worth repeating:—

'Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from, and unaffected by, such equities[7].'

In other words, when it was intended that an obligee was not to set up equities, he is not to be permitted to do it. Strange

[1] 3 & 4 Anne, c. 9.
[2] *Miller* v. *Race*, 1 Burr. 452.
[3] *Grant* v. *Vaughan*, 3 Burr. 1516.
[4] *Peacock* v. *Rhodes*, Doug. 636.
[5] *Wookey* v. *Pole*, 4 B. & Ald. 1, 22 R. R. 594.
[6] *Gorgier* v. *Mieville*, 3 B. & C. 45, 27 R. R. 290.
[7] Ante, p. 137.

that there should ever have been any difficulty about that proposition, even in getting it stated.

Observe how this sentence and the statutes cut into our notions of 'negotiability.' A 'negotiable' chose in action is one transferable at law, upon which the transferee may sue in his own name. Is it?—Then all contracts arising out of contracts are now 'negotiable.' A 'negotiable' instrument is one that passes to a transferee free from equities. Is it?—Then all contracts 'intended to be assignable free from and unaffected by such equities' are 'negotiable'; and overdue bills and notes are not.

Evidently, then, 'negotiability' is no longer a word with which to conjure up paradoxical conclusions. The 'negotiable instrument' category was originally formed to meet the case of a single sort of document. The essentially distinguishing characteristic of such instrument was not observed. Other documents, therefore, which had that characteristic, but were dissimilar from bills of exchange in other immaterial respects, were denied admission to the category. Nevertheless, upon one ground or another various classes of documents were eventually admitted. Now we see that ambulatory intent was the true distinguishing characteristic, and the category must be rectified accordingly.

Freedom from equities.—There are generally supposed to be two points at which 'negotiability' affects the rights of the holders of bills and notes. The first has regard to equities affecting *liability* upon them; and the second relates to the equities of the real owner of the paper, as against some holder of it who claims title through a finder, a thief, or a fraudulent trustee. These two cases must be treated separately in order to ascertain accurately the true foundation of the law which governs them. The law we know fairly well; what is the rationale of that law?

1. There is a choice of explanations in the first of these problems (why cannot the maker of a note set up his equities as against a bona fide transferee of it?); and neither of them is indebted for its rationality to the law-merchant:—

(*a*) One of them has already been indicated—the maker of a note is liable upon it to a holder in due course, although he may have equities, because—

'The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note bona fide, not by virtue of any assignment of the promise but by an original, and direct, promise, moving from the maker to the bearer[1].'

[1] Ante, p. 136.

Observe carefully what is here meant. It is not that the transferee does not acquire title to a note 'by virtue of any assignment' of it; but that having so acquired it, the promise that he sues upon is one directly with himself. That is to say, he does not allege that the maker promised the payee that he would pay a third person—that is an endorsee; but that the promise was to the transferee, although at the time of the promise he was an unascertained person. In this view the case would be analogous to promises frequently made by advertisement to pay to the finder of a lost article. In such case the promise is not with the newspaper, but with the person who answers the description contained in the promise. The promise is 'an original and direct promise moving from the' advertiser to the finder.

(*b*) Perhaps, however, the better view is that of Page Wood L.J., who, in holding a company liable upon its bonds, notwithstanding equities between it and the original holder, said: 'Where there is a distinct promise held out by the company informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own[1].'

In other words, although there may be equities, yet the company is estopped from setting them up. It issued bonds redeemable to bearer; it was aware that the bonds, being ambulatory, would probably be transferred to third parties; it might have placed upon the face of the bonds notice of the equities; it enabled the original holder to deceive innocent purchasers, and it is consequently estopped from setting up its equities. Here we are upon firm ground. No support is required from the law-merchant, nor from 'negotiability.' We are not in antagonism to the general law, but are appealing to it.

2. Having thus accounted for the disappearance of the equities of persons liable upon bills and notes, let us try to ascertain upon what principle it can be held that a thief, a finder, or a fraudulent trustee may pass a better title than that which he himself has.

The usual answer is 'law-merchant' and 'negotiability,' in hopeless antagonism to the general law: 'The law-merchant validates in the interest of commerce a transaction which the common law would declare void for want of title or authority[2].'

And thus, when the question of title to lost, stolen, or misappropriated bonds came to be decided, and the courts felt that transferees in due course ought to be protected, the Canadian[3]

[1] *Re General Estates Co.*, 1868, L. R. 3 Ch. 758.
[2] Ante, p. 135.
[3] *McKenzie* v. *Montreal*, 1878, 29 U. C. C. P. 333.

and American[1] judges declared that bonds were 'negotiable.' This was thought to be a sufficiently satisfactory solution of the problem.

In England, a different and a most peculiar course was adopted. Most of the judges were quite unwilling to hold that bonds were 'negotiable,' and yet they were unable to see any other ground upon which they could decide in favour of the transferee. They therefore determined that although bonds were not 'negotiable,' yet that the persons dealing with them were estopped by their form (payable to bearer) from so saying. We shall return to this point.

Mr. Justice Blackburn's criticism of that proposition should have been sufficient[2]:—

'The company had power to estop itself in that way, but the plaintiff is obliged to contend in this case that they had also power to alter and abandon the right of those who might become holders of the instrument, and to declare that such persons should, contrary to the general rule of law, hold their property on a precarious title, liable to be divested if a thief or finder could find a bona fide purchaser for the debenture.'

To this Lord Cairns made an extraordinary reply, formulating the doctrine of 'negotiability by estoppel[3]':—

'The scrip itself would be a representation, to any one taking it—a representation which the appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith and for value, the person taking it would stand, to all intents and purposes, in the place of the previous holder. Let it be assumed for the moment that the instrument was not negotiable; that no right of action was transferred by the delivery; and that no legal claim could be made by the taker, in his own name, against the foreign Government; still the appellant is in the position of a person who has made a *representation* on the face of his scrip, *that it would pass with a good title*, to any one on his taking it in good faith, and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. My Lords, I am of opinion that on doctrines well established, of which *Pickard* v. *Sears* may be taken to be an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired.'

[1] Daniel on Neg. Insts. s. 1500.

[2] *Crouch* v. *Crédit Foncier*, 1873, L. R. 8 Q. B. 386; 42 L. J. Q. B. 183.

[3] *Goodwin* v. *Robarts*, 1876, 1 App. Cas. 476; 45 L. J. Q. B. 748. This view has been widely indorsed: see per Lord Hatherley, 1 App. Cas. 491 sqq.; *Easton* v. *London Joint Stock Bank*, 1886, 34 Ch. D. 95; 56 L. J. Ch. 569; 13 App. Cas. 333; 57 L. J. Ch. 986; *Simmons* v. *London Joint Stock Bank* [1891] 1 Ch. 294; 60 L. J. Ch. 313; [1892] A. C. 201; 61 L. J. Ch. 723. The phrase 'negotiability by estoppel' belongs to Bowen L. J.; *Easton* v. *London Joint Stock Bank*, 1886, 34 Ch. D. at p. 113; 56 L. J. Ch. 569.

The present writer has found it impossible to accept this doctrine. Reduced to simple terms, the proposition is this: A non-negotiable instrument payable to bearer is, in itself, a representation that it is a negotiable instrument, and such representation will estop some one from denying that such is its legal effect. But surely a non-negotiable instrument or any other document cannot, in itself, be a representation that it is anything but what it is. If, connected with the instrument, there were some misrepresentation of its character, that would be another matter. A man may allege that he is a woman, but he can hardly, himself, be such a representation.

Observe, further, that Lord Cairns said that the document was a representation 'that it would pass, with a good title, to any one, on his taking it in good faith, and for value.' But the only feature that can be referred to in support of this is that the instrument was payable to 'bearer,' and that, surely, cannot amount to a representation that according to law a new bearer's title would be any better than that of the old one [1].

Another essential ingredient, too, of estoppel, is entirely absent from the cases, namely, evidence that the purchaser of the bonds was misled by the misrepresentation, and upon the faith of it changed his position. The probabilities are that his opinion was exactly the same as that of the true owner of the documents, and that he acted exclusively upon his own ideas of negotiability.

'Negotiability,' then, whether real or by estoppel, is the reason assigned for holding that the transferor's title may be improved by his assignment; but this explanation is altogether unsatisfactory, for 'negotiability,' as we have seen, itself stands very much in need of explanation. In some cases, for example, evidence has been given that bonds are 'negotiable,' but the judges have not been able to agree (as we may now very well understand) as to the effect of such proof. In one case, Bowen L.J., while admitting that it had been shown that title to the bonds would pass by delivery, yet objected that it did not follow 'that delivery by a person who has no title, confers nevertheless a title on a bona fide holder [2].'

And although Lord Watson thought that—

'It necessarily follows from the negotiable character of the documents that Delmar who was lawfully in possession of them for a special purpose, was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith [3].'

[1] See the judgment of the same learned judge in *Re Natal Investment Co.*, 1868, L. R. 3 Ch. at p. 360; 37 L. J. Ch. 362; also *Williams* v. *Colonial Bank*, 1888, 36 Ch. D. 388; 38 Ch. D. 388; 58 L. J. Ch. 826: see S. C., sub nom. *Colonial Bank* v. *Cady*, 1890, 15 App. Cas. 267; 60 L. J. Ch. 131.

[2] *Simmons* v. *London Joint Stock Bank* [1891] 1 Ch. 294; 60 L. J. Ch. 313.

[3] Ib. [1892] A. C. 213; 61 L. J. Ch. 723.

yet it is quite clear that the noble Lord was taking out of the word 'negotiable' exactly what he put into it, and that all that could be said was that a thief may pass a good title to a 'negotiable' instrument, if that result be included in the word 'negotiable.'

Estoppel by Ostensible Ownership.—Although without much direct support, the present writer ventures to suggest that the true foundation for the decision of such cases is to be found not in 'estoppel by negotiability,' nor in 'negotiability' of any kind, but in estoppel by ostensible ownership, or ostensible agency.

Let us commence with *nemo dat quod non habet*. That proposition looks as though it ought to be universally true. But it is said that it fails in the case of 'negotiable' instruments, and that a man can give that which he has not got, provided it be a 'negotiable' document. Is the principle a true one? And if so, are 'negotiable' documents the only exceptions to it?

Let us remember that if a thief sells a horse in market overt, he gives a title that he has not got. And if a mortgagor, having been foolishly intrusted by the mortgagee with the title deeds, conveys to an innocent purchaser, he gives that which he has not got[1]. In short, the cases are legion in which ostensible owners of property give to bona fide purchasers that which they have not got.

But we are going much too fast, and although with plenty of precedent for it, are using language in much too loose a fashion. Is it true that an ostensible owner of property can convey to a purchaser a better title than he has? Should the true owner of a horse stand by while a pretending owner sells the animal to an innocent purchaser, it would be quite inaccurate to say that the vendor gave a better title than he had. He could not do so. And the language really imports nothing but this, that although the purchaser had acquired no title at all, yet that the true owner is estopped from so saying.

Nemo dat quod non habet is then true—universally true; but its truth in no way prevents an owner of property from being estopped by his conduct from setting up his good title as against a transferee who has none.

This is the point. And it applies as well to 'negotiable' instruments as to all other sorts of property. When so applied it solves all the difficulties which, being thought to be insolvable, have been referred to the inscrutable play of the law-merchant operating in antagonism to the common law.

Remembering then that ostensible ownership may often estop

[1] *Perry-Herrick* v. *Attwood*, 1857, 2 De G. & J. 21; 27 L. J. Ch. 121; *Brocklesby* v. *Temperance Building Society* [1895] A. C. 173; 64 L. J. Ch. 433.

a true owner (of all sorts of property) from setting up his title as against an innocent purchaser, attention must be directed to the fact that the appearance of ownership takes its colour sometimes from the character of the property in question, sometimes from the nature of the usual employment of the ostensible owner, and sometimes from the customs of the place in which the transaction takes place[1]. Observe next the distinction between the appearance of ownership (1) of goods, and (2) of ambulatory instruments. Possession of goods is (usually) no indication of ownership of them, and therefore no one is misled by possession; but—

'Every holder of the bill takes the property, and his title is stamped on the bills themselves. The property and possession are inseparable. This was necessary to render them negotiable; and in this respect they differ essentially from goods of which the property and possession may be in different persons[2].'

A holder of a bill, then, *appears* to be the owner of it, while there is usually no such appearance in the case of goods. Now the law of estoppel by ostensible ownership of goods is well known, and may shortly be stated to be that if an owner permit another to appear to be the owner, he will be estopped as against persons dealing with that other. And the rule includes, of course, ambulatory instruments; the only distinction between them and goods being as to the circumstances which constitute appearance of ownership. In the case of ambulatory documents, mere possession of them is enough[3]; while as to goods there must be something more. But in both cases alike, the true owner must avoid the appearance of ownership in another. And, therefore, the owner of an ambulatory instrument must, if he wish to be safe, keep it in his own possession.

Estoppel by Ostensible Agency.—Sometimes the validity of a transferee's title must be attributed to ostensible agency rather than to ostensible ownership. In the case of goods, for example, the owner may be estopped by a person alleging his agency to sell, although none, in fact, existed—if the owner has permitted the appearance of agency. The usual case of a sale by a factor in defiance of his instructions is a sufficient illustration of the point. In the same

[1] See cap. 26.

[2] *Collins* v. *Martin*, 1797, 1 Bos. & P. 651, 4 R. R. 752. And see per Lord Mansfield in *Peacock* v. *Rhodes*, 1781, Doug. 636; *Murray* v. *Lardner*, 1864, 2 Wall. 110; *Martin* v. *Martin*, 1898, 51 N. E. Rep. 691; Cent. Dig. vii. 2551, 2, 8. The language quoted in the text is inaccurate. Property and possession of bills, as of aught else, are separable; otherwise I could never bring trover for bills against my bookkeeper. What is meant is that possession and *appearance* of property are inseparable. Even that is not universally, but only commonly true. Circumstances may sometimes indicate agency and not title.

[3] Possession of an equitable assignment of money is ostensible ownership of the fund: *State* v. *Hastings*, 1862, 15 Wis. 83.

way, a bill-broker having bills in his possession may be understood to be an agent merely, and a transferee of the bills would therefore be unable to plead that the broker was the ostensible owner of them. Ostensible agency to deal with the bills would answer the same purpose.

Lost or Stolen.—It may be suggested that this explanation is insufficient in the case of lost or stolen documents. No doubt, it may be said, if an owner of bills or of goods permit the appearance of ownership or agency in another person he ought to be estopped as against an innocent purchaser; but how can that apply to cases in which the true owner gives no such permission, to cases in which, indeed, he may be actively endeavouring to neutralize false appearances?

Much analogy to the law of estoppel is to be found in the department of torts, which declares for liability in case of wilful injury; but it also imposes damages where the injury was the result of carelessness. And so also in the law of estoppel, if through the carelessness of the true owner of property, another person is enabled to pose as its owner, he may be estopped to the same extent as if the deception were his own design.

An owner of ambulatory instruments is aware that possession of them is evidence of their ownership. It behoves him, therefore, to exercise 'consummate caution' with regard to them, and if they escape him, he and not an innocent purchaser ought to suffer. This law is not more unreasonable than that which provides that 'more than ordinary care, nay, "consummate caution[1]," is required of persons dealing with dangerous weapons[2],' and is supported by the dictum of Lord Coleridge: 'A man may be more careless with regard to the custody of a thing that can be made available only by means of forgery than if by mere larceny[3]'—more careless, for example, of a wardrobe, than of money or company bonds.

Owners of ambulatory instruments have two courses open to them. They may, by appropriate indorsement, restrict the transferability of their documents; or they may leave them payable to bearer. If they adopt the first alternative they are safe from loss and theft. But if, for their own purposes, they prefer that the instruments should remain payable to bearer, they must provide sufficiently against escape in order that innocent purchasers may not be swindled. This doctrine found acceptance as early as 1764:—

'Though both the claimants are innocent; yet as Bicknell lost the note and Grant took it in the course of trade bona fide, and

[1] Per Earle C. J. in *Potter* v. *Faulkner*, 1861, 1 B. & S. 805. And see *Dixon* v. *Bell*, 1816, 5 M. & S. 198, 17 R. R. 308. [2] Pollock on Torts, 5th ed., pp. 46, 455.
[3] *Arnold* v. *Cheque Bank*, 1876, 1 C. P. D. 581; 45 L. J. C. P. 562.

upon a valuable consideration Grant has the better equity. But if their equity were only equal, it is a known and a good rule, that *Melior est conditio possidentis*; and that would be sufficient to turn the scale *if there was negligence* on one side, and none on the other, that also would turn the scale: and if there be any on either side in this case it should seem to have been rather *imputable to the person who lost it* than to him who thus took it in the course of trade[1].'

And in 1820, Mr. Justice Best, in dealing with misappropriated exchequer bills, which the owner had kept in blank instead of rendering them useless to others by filling in his own name, said:—

'It is the plaintiff's own negligence *in not filling up the blank* that has rendered it impossible for the defendants to ascertain that he had any right to it; and it would therefore be inconsistent with the law of justice[2], that under such circumstances he should be allowed to call on them to make good the loss that has arisen from the fraud of his agent[3].'

Market overt.—It is noteworthy that the application of the law of estoppel above suggested, or something very nearly akin to it, was the foundation for holding that a purchaser from a thief in market overt was to be protected from the true owner. Cockburn C.J., in *Crane* v. *London*[4], said:—

'Look to the origin of the law as to such sales. It arose at the time when there was much greater simplicity of practice between buyer and seller. The practice then was to buy in markets at fairs. Shops were very few in London, and persons whose goods were taken feloniously would know to what place to resort in order to find them. I can therefore quite understand that the law in question was established for the protection of buyers, that, *if a man did not pursue his goods* to market where such goods were openly sold, *he ought not to interfere* with the right of the honest and bona fide purchaser.'

Observe the close analogy here presented to estoppel as applied to bills and notes. As we have seen, 'title is stamped on the bills themselves'; the holder may, therefore, properly be presumed to be the owner; the real owner might have kept them 'in his pocket,' but, if he permitted others to have them, the representation of ownership which they carried with them would estop him from asserting his title. So it is in the case of sales in market overt. Their possession indicates ownership; and if a man does not

[1] Per Wilmot J. in *Grant* v. *Vaughan*, 3 Burr. 1526. See the same reasoning applied to vouchers in *Coudry* v. *Vanderburgh*, 1879, 101 U. S. 572; to bills of lading in *Lickbarrow* v. *Mason*, 1787, 2 T. R. p. 71; and to stock certificate with blank but signed transfer and power of attorney in *National* v. *Gray*, 1898, 12 App. D. C. 276, *Contra*, *Scotland* v. *Rollins*, 1899. 53 N. E. Rep. 863 (Mass.).

[2] More specifically, *estoppel*.

[3] *Wookey* v. *Pole*, 1820, 4 B. & Ald. 1.

[4] 1864, 5 B. & S. 318; 33 L. J. Q. B. 224.

'pursue his goods to market,' but allows the representation of ownership in others to be made, 'he ought not to interfere;' he is estopped.

Loss of Seal.—Further support for the views advanced may be gathered from the olden times, when every man of property had his own distinctive seal, with which, rather than with his signature, he executed his obligations. In those days a finder, a thief, or a fraudulent custodian of the seal, might bind the owner, in favour of innocent persons, upon the ground that '*he* (the owner) *should have taken better care of it.*' Sufficient of the learning upon this subject for present purposes is contained in the following extract from a judgment of Wills J.[1]

'In Glanvil, book 10, ch. 12, it is said that the man who entrusts his steward with his seal will be bound by it, if the steward seals a deed with it, *for he should have taken better care of it.* Bracton (edition published by the Record Commissioners, and edited by Sir Travers Twiss, vol. vi, p. 126) says, that a man may get rid of his deeds by showing various matters, such as duress, mistake, or the like, but adds the qualification that *there must be nothing in the way of negligence* on his own part—as in entrusting his seal to his seneschal or his wife. Britton says, that a man may plead that the writing ought not to affect him, for when it was made he had lost his seal, and caused it to be cried, and published, at the churches and markets; so that if anything was made under that seal after a certain day on which it was lost, it ought not to affect him (book 1, ch. 29, pl. 17). A curious account is given in Mr. Nicholl's note (vol. i, p. 164 of his edition) of a plea of this description, relating to the seal of Arnold de Thorley, which was met and defeated by production of a record of acknowledgment at the Hertford Assizes, 39 Henry III, of the seal in question, by the said Arnold; and two advertisements of the loss of a seal, warning the public that an instrument sealed with it after a certain day would be forgery, are given in Blount's Law Dictionary, tit. "Seal" and "Sigillum." The passage from Bracton is reproduced in Fleta, who wrote towards the end of the thirteenth century, but without any additional remarks.'

Neglect as to the custody of your property then, be it horses, seals, or transferable documents, may, where other persons are misled by ostensible title in possessors of them, estop the owner from following his property. This is general law and was not borrowed from the law-merchant[2].

Further Considerations in Support.—Acknowledging that there is

[1] 1887, 21 Q. B. D. 166; 57 L. J. Q. B. 418.

[2] In Pollock on Contracts, 6th ed., 135 n, referring to the loss of seals, it is said: 'That the practice of publishing formal notice in case of loss really existed is shown by the example given in Blount's Law Dictionary, s. v. *Sigillum*, dated 18 Ric. II. In modern law such questions, when they occur, come under the head of estoppel.'

not much direct and specific support for the propositions contended for in this article, it is nevertheless of interest to note the trend in that direction (culminating in something little short of formulation of the principles enounced), and to put in contrast the older view.

Commencing with money, it is usually said that the reason that a thief can pass a good title is because 'of the currency of it; it cannot be recovered after it has passed in currency'[1]: that is, a good title to money passes because it is money. And if we ask for something more satisfactory than that we may find it in Lord Shand's remark (one hundred and thirty-five years afterwards) with reference to some cash which had been entrusted to an agent, and by him wrongfully diverted to his own purposes: 'He has thus the opportunity, and may take advantage of this to misapply and to appropriate to his own use the money intrusted to him[2].' This assertion must, however, find foundation in some specific law, and its proper reference is clearly apparent. The true owner enabled his agent to pose as owner, and is therefore estopped by the assistance rendered to his misrepresentation of ownership.

If the reason in the case of money was because it was money, the rule was applied to bills and notes because they are 'like so much money,' and are 'negotiable':—

'If a bill be payable to *A* or bearer it is *like so much money* paid to whomsoever the note is given; that let whatever accounts or conditions soever be between the party who gives the note, and *A* to whom it is given, yet it shall never affect the bearer[3].'

'Bills of exchange and promissory notes are representatives of money circulating in the commercial world as such[4].'

'The reason is that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country[5].'

'A negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law[6].'

Money passes with a good title because it is money; and notes because they are like money; and then a foreign bond because it is like a note.

'In its nature precisely analogous to a bank-note payable to

[1] Per Lord Mansfield, in *Miller* v. *Race*, 1758, Burr. p. 457. And so where a £5 gold-piece, which, although current coin, was something of a curiosity, had been stolen and sold to a dealer in curiosities, the title revested in the owner upon conviction of the thief: *Moss* v. *Hancock* [1899] 2 Q. B. 111; 65 L. J. Q. B. 657.

[2] *Thomson* v. *Clydesdale* [1893] A. C. 291; 62 L. J. P. C. 91.

[3] *Crowley* v. *Crowther*, 1702, 2 Freeman, 257. And see per Channell B. in *Moss* v. *Hancock* [1899] 2 Q. B. 118; 68 L. J. Q. B. 657; Byles on Bills, 15th ed., 186; *Foster* v. *Green*, 1862, 31 L. J. Ex. 158.

[4] *Friedlander* v. *Texas*, 1889, 130 U. S. 416.

[5] Per Williams J. in *Ingham* v. *Primrose*, 1859, 7 C. B. N. S. 82.

[6] Per Tindal J. in *Jenkyns* v. *Usborne*, 1844, 7 M. & G. 699; 13 L. J. C. P. 196.

bearer, or to a bill of exchange indorsed in blank. Being an instrument therefore of the same description it must be subject to the same rule of law that whoever is the holder of it has power to give title to any person honestly acquiring it [1].'

The transition stage between mere empiricism and rationality may be represented by language of Lord Cairns with reference to certain misappropriated scrip for bonds:—

'The appellant might have kept this scrip in his own possession, and if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker, or agent; and although it is stated that it remained in the agent's hands for disposal, or to be exchanged for the bonds when issued as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent.'

In other words, the broker had ostensible authority to sell; ostensible authority cannot be displaced by 'private instructions'; therefore, although there was no authority to sell, yet the true owner is estopped from so asserting. That is the ordinary law of estoppel.

To the same effect, but much more nearly approaching scientific statement, is the language of Mr. Justice Taschereau, in a case in the Canadian Supreme Court, with reference to bonds: 'In constituting his agent *the apparent absolute owner* of these securities and conferring upon him all the indicia of ownership, he *precludes* himself from disputing the title of any subsequent bona fide transferee [2].' There is much in the United States authorities which may be cited in support of some of the views here advocated. For example, in Colebrooke on Collateral Securities, it is said:—

'The principle of estoppel by conduct, that when the owner of property in any form clothes another with the apparent title and power of disposition, third parties who are thereby induced to deal with him are protected, is applied to choses in action, non-negotiable in character [3].'

'The rules of estoppel in *pais* are enforced against an owner of a non-negotiable chose in action who has, with mistaken confidence, entrusted the indicia of title, and the apparent absolute ownership, by endorsement and delivery to a third person, so that he is able to deceive bona fide pledgees advancing value upon the faith and credit of such documents of title and apparent absolute ownership,

[1] *Gorgier* v. *Mieville*, 1824, 3 B. & C. 45.
[2] *Young* v. *MacNider*, 1895, 25 S. C. 272, 279.
[3] P. 590; citing *Cowdry* v. *Vanderburgh*, 101 U. S. 572; *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325. See to same effect, per Boyd C. in *Re Central Bank*, 1899, 17 Ont. 586.

without notice that the act of the pledgee is a fraudulent misappropriation, and an unauthorized act [1].'

So also in Bigelow on Estoppel [2].

'It should be observed that while the rule in *Pickard* v. *Sears* finds most frequent expression in transfers of property, it is not confined to such cases; it includes all cases of false representation and fraudulent silence, whatever the nature of the transfer. . . . So again, if a man purchase bona fide and for value an unnegotiable chose in action, from one upon whom the owner has by assignment, or otherwise, conferred the apparent absolute ownership, he obtains a valid title against the real owner, supposing the act of purchase to have been induced by such act of the owner [3].'

And in England in a case [4] in which a transfer of shares, blank as to the purchaser's name, was given to a broker who misapplied it, Lord Herschell said:—

'*If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title, as against a person to whom such third party has disposed of it,* and who received it in good faith and for value. And this doctrine has been held by the Court of Appeal of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently, or in excess of his authority, sells or pledges them. The bank or other persons, taking them for value without notice, have been entitled to hold them as against the owner [5]. As at present advised, I do not see any difference between the law of the State of New York and the law of England in this respect [6].'

It will be observed that these supporting quotations all deal with 'non-negotiable' choses in action. They sufficiently establish the principle that ostensible ownership or agency of such documents may estop the true owner from setting up his title to them. But it has not hitherto been observed that the same doctrine applies to

[1] P. 487; citing *Coombes* v. *Chandler*, 33 Ohio St. 178; *Moore* v. *Bank*, 55 N. Y. 41; *McNeil* v. *Tenth Nat. Bank*, 46 ib. 325; *Cowdry* v. *Vanderburgh*, 101 U. S. 572; *Davis* v. *Beckstein*, 69 N. Y. 442; *Werrick* v. *Mahoning Co. Bank*, 16 Ohio St. 296; *Dillaye* v. *Commercial Bank*, 51 N. Y. 345; *Clark* v. *Roberts*, 25 Hun. 86.

[2] 5th ed., p. 562; citing *Moore* v. *Metropolitan Bank*, 55 N. Y. 41; *Henty* v. *Miller*, 94 N. Y. 64; *Coombes* v. *Chandler*, 33 Ohio St. 178.

[3] Mr. Bigelow did not observe the general application of this language in his later work (on Bills and Notes) when he wrote (p. 3): 'Purchase of land, or goods, for value, and without notice, cuts off equities; that is a cardinal rule of law, and always has been in courts of equity. But it has never been applied to undertakings to pay, in the case of common law contracts; applied to undertakings to pay, as purchase for value without notice often is, the principle has reference to bills, notes and cheques only.'

[4] *Colonial Bank* v. *Cady*, 1890, 15 App. Cas. 267; 60 L. J. Ch. 131.

[5] See *Montagu* v. *Perkins*, 1853, 22 L. J. C. P. 185.

[6] For the New York law, see *McNeil* v. *Tenth Nat. Bank*, 1871, 46 N. Y. 325. See also in Ontario, *Smith* v. *Rogers*, 1899, 30 Ont. 256; and in Ireland, *Horne* v. *Boyle*, 1890, 27 L. R. Ir. 137; *Waterhouse* v. *Bank of Ireland* [1892] 29 L. R. Ir. 384; and in Minnesota, *Brown* v. *Equitable*, 1899, 78 N. W. Rep. 1045.

'negotiable' instruments also (why should it not?); and that there is no necessity for an appeal to the law-merchant and its antagonism to the ordinary law.

Or to put the matter more accurately, and sum up what has been said:—

(1) A chose in action is ambulatory or non-ambulatory. It may also be sometimes the one and sometimes the other. A promissory note, for example, may be ambulatory (redeemable to third persons), or non-ambulatory (redeemable to a certain person only). It is always 'negotiable' in the sense that being a chose in action arising out of contract it may be transferred. It is sometimes not 'negotiable,' in the sense that a transferee of it will take subject to equities.

(2) Contractors in ambulatory agreements are estopped as against innocent transferees from setting up equities which may exist between them and their contractees.

(3) The true owners of ambulatory contracts may be estopped from asserting their title to them, by permitting the appearance of ownership in other persons.

(4) These results are in no way due to the law-merchant; they are not in antagonism to the general law; they are parts of it.

(5) The word 'negotiability' with its *double entente* is not only unnecessary, it is disturbing and distracting.

Having thus opened up a new category, let us take a short survey of the instruments to be placed in it.

All the old 'negotiable' instruments are of course admissible.

And we must add foreign government and company bonds [1].

And domestic company bonds [2].

And scrip for bonds, that is to say, promises to deliver not money, but bonds [3].

And scrip for shares [4]; that is to say, promises redeemable not in money but in property [5].

And payable to order or bearer bonds, although secured by complicated mortgages [6].

[1] *Gorgier* v. *Mieville*, 1824, 3 B. & C. 45; *Simmons* v. *London Joint Stock Bank* [1891] 1 Ch. 270; 60 L. J. Ch. 313; [1892] A. C. 201; 61 L. J. Ch. 723; *Bentinck* v. *London Joint Stock Bank* [1893] 2 Ch. 120; 62 L. J. Ch. 358; *Venables* v. *Baring* [1892] 3 Ch. 527; 61 L. J. Ch. 609.

[2] *Re General Estates*, 1868, L. R. 3 Ch. 758; *Higgs* v. *Northern*, 1869, L. R. 4 Ex. 387; 38 L. J. Ex. 233; *Re Imperial Land Co.*, 1870, L. R. 11 Eq. 478; 40 L. J. Ch. 93 (but see *Crouch* v. *Crédit Foncier*, 1873, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183); *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q. B. 658; 67 L. J. Q. B. 986.

[3] *Goodwin* v. *Robarts*, 1875, L. R. 10 Ex. 76; ib. 345; 1 App. Cas. 476; 45 L. J. Q. B. 748.

[4] *Rumball* v. *Metropolitan*, 1877, 2 Q. B. D. 194; 46 L. J. Q. B. 346.

[5] *Atlanta* v. *Hunt*, 1897, 100 Tenn. 89; 42 S. W. Rep. 482.

[6] *Webb* v. *Herne Bay*, 1870, L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; *Fogg* v. *School District*, 1898, 75 Mo. App. 159. But see *Parmenter* v. *Colvick*, 1897, 45 N. Y. S. 748; 53 N. Y. S. 1111.

And letters of credit [1].

And blank transfers of shares [2].

And deposit-receipts [3].

These and other such instruments are clearly intended to be ambulatory; and reason and authority concur in putting them in the same category.

The present writer would add bills of lading, warehouse receipts [4], delivery orders, and other well-known indicia of title to goods. If one reflects upon 'negotiability' and its technicalities, such instruments, of course, fail to reach the standard. They are for goods, and not for money—were there no other objection to them. When, however, we remember that scrip for *bonds* (not for money) are already in the list, it is hard to see why agreements to deliver goods must necessarily be left off. Are they intended to be ambulatory? that is the question. If so, the original contractor cannot set up his equities against an innocent transferee; and a true owner must keep possession, and not, by parting with it, permit the appearance of ownership in another person.

There are other documents about which there may be a greater difference of opinion; but which the writer thinks ought to be dealt with according to the principles with which we have been considering:—

Vouchers.—Sometimes vouchers or certificates indicating that persons named in them are entitled to certain sums of money are intended to be ambulatory, and transferees will therefore, upon the principles of estoppel, take free from equities. In one case [5] a contractor obtained a certificate from the auditor of a Board of Works, that he was entitled to $8451.88; the contractor endorsed the certificate in blank, and deposited it as security for a loan of $3160; and the pledgee fraudulently disposed of it to an innocent purchaser; it was held that—

'The complainants could have expressed in their endorsement the purpose of the deposit . . . that it was as security for a specified sum of money—and thus imparted notice to all subsequent pur-

[1] *Re Agra & Masterman's Bank*, 1867, L. R. 2 Ch. 391; 36 L. J. Ch. 222; *Johannesen* v. *Munroe*, 1899, 185 N. Y. 641; 53 N. E. Rep. 535.

[2] Ante, p. 154.

[3] See 3 & 4 Anne, c. 9; *Nicholson* v. *Sedgwick*, 1690, 1 Ld. Ray. 180; 3 Salk. 67; *Partridge* v. *Bank of England*, 1846, 9 Q. B. 396; *Re Commercial Bank*, 1897, 11 Man. 494; *Re Central Bank*, 1889, 17 Ont. 574; *First Nat. Bank* v. *Security*, 1892, 51 N. W. Rep. 303; 34 Neb. 71; *Kirkwood* v. *First Nat. Bank*, 1894, 58 N. W. Rep. 1016; 40 Neb. 484; *Sauce* v. *Exchange*, 1894, 58 N. W. Rep. 1135; 40 Neb. 497; *Hagar* v. *Buffalo*, 31 N. Y. 448; *Auten* v. *Graham*, 1899, 81 Ill. App. 502.

[4] *Collins* v. *Rosenbam*, 1897, 43 S. W. Rep. 726 (Ky.). See the Alabama Code, sec. 4322; and *Danforth* v. *McElroy*, 1899, 25 So. Rep. 840.

[5] *Cowdry* v. *Vanderburgh*, 1879, 101 U. S. 572. And see *Cudahy* v. *Sioux, &c.*, 1896, 75 Fed. Rep. 473; *Moore* v. *Metropolitan*, 1873, 55 N. Y. 41. See also *Armour* v. *Michigan, &c. Railway*, 1875, 65 N. Y. 123.

chasers or assignees, that the pledgee held only a qualified interest in the claim. But having endorsed their name in blank, they virtually authorized the holder to transfer or dispose of the certificate by writing an absolute assignment over their signature.'

Mortgages.—It is interesting to note the application of the principles in hand to the case of a mortgage. Here we have a debt—a chose in action [1] and real estate security for its payment. By its terms, and according to usage, the document is intended to be ambulatory; but the transfer of it is a matter requiring time for its accomplishment, and it is therefore unsuitable for the rapid financial operations of the moment; moreover its payments are usually long deferred, and thus changes in the relations of the parties to it are more customary than in the case of shorter dated commercial paper.

The law of estoppel has adapted itself to these peculiarities. It is customary for a purchaser of a mortgage to make inquiries of the mortgagor as to the state of the account between him and the mortgagee, and it is not doubted that by his answers the mortgagor would be estopped. No such inquiry is made in the case of bills and notes, and transferees of them are not affected by premature payments. The reason is to be found in custom, and the custom is founded upon the considerations above suggested. Estoppel proceeds upon misrepresentation. In the case of a mortgage, premature payment will not mislead, because of the custom to inquire, which the mortgagor may depend upon being pursued. There is no such custom in the case of bills and notes; premature payment will mislead; and the payer may have to pay again.

But observe that, if a mortgage be offered in sale to me, although I ought to inquire as to alterations of relations between the parties, I have no reason for doubting that the document was originally a real instrument, and that it truthfully represents the transaction between the parties. For example, if £200 appears to be secured by it (and more especially if a receipt for that amount is endorsed upon it), I am not bound to imagine that only £40 was really advanced. The mortgagor knew when executing the document that it was of ambulatory character; he knew that people would rely upon his receipt; and he is therefore estopped [2]:—

'But they were inexact and careless, *and placed in the hands of Bates or Astley the means of deceiving other persons*, and these are in the view of a Court of Equity demerits [3].'

[1] *Martin* v. *Bearman*, 1880, 45 U. C. Q. B. 205. See, however, *Hopkins* v. *Hemsworth* [1898] 2 Ch. 347; 67 L. J. Ch. 526.

[2] *Bickerton* v. *Walker*, 1885, 31 Ch. Div. 151; 55 L. J. Ch. 227; *Chambers* v. *Goldwin*, 1804, 9 Ves. at p. 264; approved in *Mangles* v. *Dixon*, 1852, 3 H. L. C. p. 737.

[3] Per Fry L. J., 31 Ch. Div. at p. 158.

This law is of special importance in the United States, where usually a mortgage debt is represented by a promissory note. It was there said that the mortgagor was estopped upon principles,

'which forbid a man who, as security for negotiable notes, had executed a mortgage . . . to impair its binding force and effect by pleading secret equities, created by his own fault, negligence or imprudence, and of which the subsequent holder of the notes had no notice, and no means of information[1].'

Life Policies.—Drawing still further away from the former narrow list of 'negotiable' securities, we come to a document of debatable character. The owner of a life insurance policy transferred it, apparently absolutely, but really as security only, for money lent; the assignee, being thus the ostensible owner, fraudulently assigned the policy to an innocent purchaser; who, it was held, took it free from equities[2]. It may be said that a policy is a 'non-negotiable' chose in action, and that it therefore carries with it all equities of prior holders[3]; a fair reply is that lands too are somewhat 'non-negotiable'; but that if an owner of real estate executes an absolute conveyance to his mortgagee instead of a mortgage, he is estopped from setting up his equities as against an innocent purchaser from the grantee. In other words, a life policy is an article of property; and the principles of estoppel by ostensible ownership apply equally to all sorts of property which is intended to be passed on from one person to another.

Promises to Pay Money.—It is a most curious fact, and one which illustrates the frequently baneful effect of codifications, that while the law has been thus rapidly expanding upon the lines above indicated, so that we are now fairly well able to say that choses in action pass to a transferee free from equities, where that was the intention of the parties (the wit of man has at length come that far), certain promises to pay money to order or bearer, on the other hand, by recent decisions in England and Canada, bid fair to become an exception to the rule.

[1] *Bank* v. *Flathers*, 1892, 45 La. Ann. 78; 12 So. Rep. 244: approved in *Pertuit* v. *Damare*, 1898, 24 So. Rep. 680. In Kansas, however, it is held that the note itself is 'non-negotiable' if it refer to the mortgage: *Jones* v. *Dulick*, 1898, 55 P. Rep. 522. In Illinois it is held that the assignee takes subject to the equities; *Faris* v. *Briscoe*, 78 Ill. App. 242.

[2] *Quebec Bank* v. *Taggart*, 1896, 27 Ont. 162. And see *Wells Bridge* v. *Connecticut*, 1890, 152 Mass. 343.

[3] And it was very recently so held: *Brown* v. *Equitable*, 1899, 78 N. W. Rep. 103 (Minn.):—'The defendant has done nothing upon which to base an equitable estoppel, except the bare fact that plaintiff delivered possession of the policy to *H* accompanied by an absolute assignment without any expressed conditions or limitations, and thereby clothed with the indicia of absolute ownership.' Usually the bare fact of enabling another person to mislead third persons by appearing to be the owner of your property is thought to be an amply sufficient ground of estoppel.

A promissory note is by the Codes closely defined. This is within the prescribed limits, and that is not. Any addition to the given form takes the document out of the category of notes. And if it is not a note, then it is held that all its equities accompany it upon transfer [1]. The result therefore is that a document which is very nearly a promissory note or bill of exchange carries its equities with it (even if it be one intended to be redeemable to third persons) because of the Codes; while documents having no relation to bills or notes (and very much less like them), but which are intended to be ambulatory, do not. The fault of the decisions is that they are still using the old classification of 'negotiable' and 'non-negotiable' instruments [2]. The language of Malins V.-C., of thirty years ago, ought to be recognized as something more than a notion of a somewhat radical judge:—

'Are they then promissory notes or debentures? or does it make any difference which they are in the result? My opinion is that whichever they are the result is the same, because they in any case make a contract by which the company have bound themselves to pay, not to any particular person, but to any person who may be the bearer, the sum appearing to be due upon their face [3].'

Conclusion.—Enough has been said to indicate the safe line of further development.

Lands are intended to be transferred; so are goods; so are some choses in action.

The law as to all such classes of property is the same. Ostensible ownership or agency may estop the true owner from setting up his title as against an innocent purchaser.

The primary question then as to any particular chose in action is whether it was intended to be redeemed to the immediate contractee or to third persons also. It is not sufficient to ask whether or not it is a note or bill, for even so it may be ambulatory or non-ambulatory, and have to be classified accordingly.

When the character of the document has been ascertained, either by its form or by usage with reference to the class of instruments to which it belongs, the law of estoppel and not the law-merchant, the ordinary law and not antagonism to it, will suffice for the settlement of all questions relating to the rights of innocent transferees.

JOHN S. EWART.

[1] *Kirkwood* v. *Smith* [1896] 1 Q. B. 582; 65 L. J. Q. B. 408; *Bank of Hamilton* v. *Gillies*, 1899, 12 Man. 495.

[2] The cases in the United States vary very much as to the effect of unusual clauses in notes. The most recent of them are *Citizens* v. *Booze*, 1898, 75 Mo. App. 189; *Louisville* v. *Gray*, 1899, 26 So. Rep. 205 (Ala.); *Third Nat. Bank* v. *Spring*, 1899, 59 N. Y. S. 794; *Sclauch* v. *O'Hare*, 1899, 22 Pa. Co. Ct. 384.

[3] *Re Imperial Land Co., &c.*, 1870, L. R. 11 Eq. p. 488.

ELECTION BETWEEN ALTERNATIVE REMEDIES.

IN the January number of the Law Reports appears the case of *Rice* v. *Reed*[1]. The facts in the case were shortly these:—The plaintiff was a fur skin dyer, who used in his works large quantities of sawdust. One Henry Soltau, in the plaintiff's employment, sold without his authority large quantities of sawdust to the defendant, who bought knowing that the sales were unauthorized, and paid by cheques which Soltau lodged to his account at the Birkbeck Bank. The plaintiff brought an action against Soltau and the Bank, claiming (1) damages for conversion against Soltau, and alternatively (2) money had and received against Soltau and the Bank. On the day of the issue of the writ the plaintiff applied for, and soon afterwards obtained, an interim injunction restraining Soltau and the Bank from parting with the proceeds of the sales until the trial of the action. A month or so after obtaining this injunction, the plaintiff brought a separate action against the defendant for conversion; after which he settled the former action against Soltau and the Bank, receiving from the latter a sum of £1000, which represented so much of the proceeds of the sales as remained to Soltau's credit at the Bank. The defendant pleaded a waiver of the tort and election to sue for money had and received; but judgment was given for the plaintiff.

We cannot clear our minds of a doubt whether this case was rightly decided; not on account of the settlement of the action against Soltau and the Bank and the receipt of the proceeds of the sale, for that settlement, being made without prejudice to the plaintiff's rights against the defendant Reed, operated merely as a covenant not to sue, and not as a discharge of the right of action[2]. The doubt is whether the successful application for the interim injunction in the action against Soltau and the Bank did not operate as a conclusive election to waive the tort and sue for money had and received. If it did so operate, it is clear that the plaintiff's remedy by action for conversion was gone, and there ought to have been judgment for the defendant.

Those who are rash enough to express doubts touching the soundness of a decision of the Court of Appeal are bound to give reasons for those doubts; in order to do this it is necessary to go

[1] [1900] 1 Q. B. 54.

[2] *Duck* v. *Mayeu* [1892] 2 Q. B. 511.

at some length into the nature of an election between alternative remedies.

Now alternative remedies may be (*a*) similar remedies against either of two persons; (*b*) different remedies against the same person; (*c*) different remedies against different persons. As an example of the first class may be taken the case where a vendor sells goods to a purchaser who is in fact agent for another. Here the vendor may recover the price of the goods against either the agent or the principal. He cannot recover from both. As an instance of the second class may be taken the case where the defendant wrongfully sells and receives the proceeds of the plaintiff's goods. Here the plaintiff may recover damages for conversion, or he may waive the tort and sue for money had and received. He cannot do both. As an extension of the second class it may be observed that except where the wrongful sale is in market overt, or the plaintiff has held out the wrongful vendor as his agent for sale, or the wrongful vendor is a 'mercantile agent' under the Factors Acts, the remedy in conversion extends against the purchaser of the goods. The plaintiff may then bring an action for money had and received against the vendor, or conversion against the vendor and purchaser. He cannot do both. This is an instance of the third class, and to this class the case of *Rice* v. *Reed* belongs. If in such a case the plaintiff chooses his remedy in conversion he cannot sue the vendor for money had and received; if he chooses his remedy for money had and received he cannot sue vendor or purchaser for conversion. When he has once elected in favour of one remedy he cannot afterwards pursue the other and alternative remedy. There is no doubt that he is not bound to make his election at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons—per Lord Blackburn, *Scarf* v. *Jardine*[1]—and in this interval he may do acts which are consistent with an intention ultimately to pursue either remedy. But in the course of time there must happen some event marking the point at which the line of equivocal acts ends, the dividing of the way after which one step in either direction excludes any progress in the other. To find this point is the difficulty.

It is futile to attempt an exposition of general legal principles otherwise than by their application to particular facts. But some selection is desirable in the choice of those facts from which it is proposed to deduce the principle. If in one set of circumstances a general principle applies while in another widely different set of circumstances it does not, the discriminant factor is not easily

[1] 1882, 7 App. Cas. at p. 360.

detected; and therefore the best method of pointing a legal principle is by citing two cases, or groups of two, differing slightly in their facts but widely in principle, for then it is reasonable to infer that the difference in principle is to be found in the difference of fact, and as this is slight the margin of error is narrow.

In considering the question what is and what is not an election, we are fortunate in having several decided cases for our guidance very similar in their facts, some ranged on each side of the dividing line. It is proposed to state them briefly without further preface.

In *Brewer* v. *Sparrow*[1] the defendant had wrongfully sold certain goods, the property of a bankrupt. The assignees of the bankrupt received the accounts of the sale, and accepted from the defendant the balance appearing due on the accounts. It was held that they had elected to ratify the sale, and that they could not afterwards sue the defendant for conversion.

On the other hand, in *Valpy* v. *Sanders*[2], the defendant had wrongfully possessed himself of certain goods, the property of a bankrupt. The assignees of the bankrupt demanded, but did not receive, the price of the goods as upon a sale. It was held that they had not elected to ratify the sale and that they might afterwards sue the defendant for conversion. It is clear then that acceptance of the proceeds as money had and received is an election in favour of the remedy by action for money had and received, which precludes the plaintiff from prosecuting the alternative remedy by action for conversion.

Again in *Lythgoe* v. *Vernon*[3] the defendant had wrongfully sold certain goods the property of the plaintiff. The plaintiff demanded the proceeds of the sale, and the defendant paid all but £3 4*s*. The plaintiff then sued in conversion and the defendant paid the balance of the proceeds into Court. It was held that the plaintiff had elected in favour of the remedy for money had and received, and that he could not sue for conversion. On the other hand, in *Burn* v. *Morris*[4], the plaintiff lost a Bank of England note for £20. This note was found by *A*, who took it to the defendant to get it changed. The defendant got it changed and gave *A* £18 for it, keeping the balance himself. The plaintiff afterwards arrested *A* and brought him before the Lord Mayor, who ordered *A* to restore to the plaintiff £7, all that remained in his possession of the £18 he had received. The plaintiff, having thus recovered £7, sued the defendant in trover and recovered damages £13. The Court held that there was no election, but that the plaintiff had a right of action in trover against both *A* and the defendant, and, having merely got

[1] 1827, 7 B. & C. 310.
[2] 1848, 5 C. B. 886.
[3] 1860, 5 H. & N. 180.
[4] 1834, 2 Cr. & M. 570.

part of the damages from *A*, might recover the balance from the defendant. This case is further discussed hereafter.

In *Morris* v. *Robinson*[1] the defendant had wrongfully sold some indigo, the property of the plaintiff, and had paid the proceeds into the Vice-Admiralty Court at Mauritius. The plaintiff, by his agent at Mauritius, made a claim for the proceeds, but as they had been remitted to England the claim was unsuccessful. It was held that there had been no election, but that the plaintiff might sue the defendant for conversion. On the other hand, in *Smith* v. *Baker*[2], the plaintiff was the trustee of a bankrupt who had given to the defendant a bill of sale void as against the plaintiff. The defendant had sold the goods. The plaintiff made an application to the Court of Bankruptcy for an order that the defendant should pay over the proceeds of the goods. The order was made, and the proceeds paid under it to the plaintiff. The plaintiff then sued the defendant in trover for the difference between the proceeds of the sale and the value of the goods. But it was held that by obtaining the proceeds under the order he had elected in favour of the remedy by action for money had and received. Here again the success of the application and receipt of the proceeds of the wrongful sale is the determining fact.

Again in *Curtis* v. *Williamson*[3] the plaintiff had sold goods to one who was an agent for the defendant. The agent became insolvent and filed a petition for the liquidation of his estate. The plaintiff filed an affidavit in the liquidation stating that the agent was justly and truly indebted to him for the price of the goods sold. In fact this affidavit was filed by inadvertence, and, upon better advice, an attempt was made to prevent its being filed, but too late; however, the plaintiff took no further step in the liquidation, and no dividend was ever received from the agent's estate. It was held that there was no election. But it was otherwise in *Scarf* v. *Jardine*[4]. In that case two partners, Rogers and Scarf, carrying on business as W. H. Rogers & Co., dissolved partnership, Scarf retiring. Rogers took another partner, Beech, with whom he carried on business under the old firm name. A customer of Rogers and Scarf sold and delivered goods to Rogers and Beech after, but without notice of, the change in the firm. After receiving notice of the change he sued the new firm and, upon their bankruptcy, filed an affidavit stating that they were justly and truly indebted to him for the price of the goods sold, a statement on which he was still insisting. It was held that this was an election

[1] 1824, 3 B. & C. 196; 27 R. R. 322.
[2] 1873, L. R. 8 C. P. 350.
[3] 1874, L. R. 10 Q. B. 57.
[4] 1882, 7 App. Cas. 345.

after which the customer could not sue Scarf, the former member of the old firm.

To complete our digest we would add the case of *Armstrong* v. *Allen*[1]. There the plaintiff was a manufacturer, and had sold to shippers certain goods to be delivered alongside a vessel and paid for in cash in exchange for a clean receipt. The defendants were shipowners, and by a contract between them and the shippers, the defendants were to receive no goods for the shippers unless a clean receipt could be given. The plaintiff delivered the goods to the shipowners, the defendants; who, though they received the goods, refused to give a clean receipt. The plaintiff demanded the goods back, but as other cargo had been loaded on top of them the defendants refused to redeliver, and the goods were forwarded to consignees abroad. The plaintiff issued a writ in trover against the defendants. The consignees accepted the goods and paid for them. The shippers paid, and the plaintiff accepted the purchase price under the contract of sale. It was held by the Court of Appeal that he could not after that proceed with his action for conversion.

So much for particular instances. For statements of the general principle the following may serve: 'A man cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage': per Honyman J., *Smith* v. *Baker*[2]. This passage from the judgment of Honyman J. was cited and approved by the Court of Appeal in *Roe* v. *Mutual Loan Fund*[3]. 'If the party electing has done—whether he intended it or not—an unequivocal act, i.e. an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other, the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election': per Lord Blackburn, *Scarf* v. *Jardine*[4]. In *Clough* v. *London and North Western Railway*[5], Mellor J., in delivering the judgment of the Court of Exchequer Chamber, lays down the well-known doctrine that a vendor who has been by fraud induced to part with his goods, may on discovering the fraud elect to treat the transaction as valid or invalid. He continues[6]:

'It seems to us clear on principle that a statement in a plea by the party from whom the property has passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination to avoid the transaction as could well be made.... After succeeding by means of such a plea

[1] 1893, 67 L. T. 738.
[2] 1887, 19 Q. B. D. 347.
[3] 1871, L. R. 7 Ex. 27.
[4] 1873, L. R. 8 C. P. 350.
[5] 1882, 7 App. Cas. 345.
[6] Ibid. p. 36.

the person pleading it could never successfully set up the contract as still valid, either against the plaintiff in the action in which the plea was pleaded, or any one else.'

We are now in a position to offer a few remarks on the case of *Rice* v. *Reed*[1]. But before coming to the main decision, one of its outward phases should be noticed. It is feared that in days to come the case will be cited as an authority that there can be no election short of a judgment on one of the alternative causes of action. The only authority for such a proposition, so far as we know, is a dictum of Bramwell B. in *Priestly* v. *Fernie*[2].

'The very expression that where a contract is made by an agent in his own name, the contractee has an election to sue agent or principal, supposes he can only sue one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued, and fresh proceedings be well taken against the other.'

The question in that case was whether a judgment unsatisfied against the agent amounted to an election, and it was held, and no one would now dispute it, that it did. The dictum was therefore unnecessary for the decision of the case. As against it there is the equally weighty dictum of Lord Blackburn in *Scarf* v. *Jardine*[3] that the issue of the writ is the important act, and that judgment or no judgment is immaterial. But we need not trouble ourselves with dicta when we have the decided cases of *Brewer* v. *Sparrow*[4], *Lythgoe* v. *Vernon*[5], and *Armstrong* v. *Allen*[6], in each of which it was held that there had been an election before ever judgment was recovered.

To come now to closer quarters with the case of *Rice* v. *Reed*[7]. It purports to rest on the authority of *Burn* v. *Morris*[8], and *Morris* v. *Robinson*[9]. The former was the case above referred to of the bank-note; it was not a case of election; the property converted never changed its nature so as to make acceptance of part of it referable to a right or cause of action different from that which was ultimately prosecuted. In the words of Lord Mansfield

'The whole fallacy turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz. to goods. . . . Now they are not goods . . . but are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind; which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash[10].'

[1] [1900] 1 Q. B. 54.
[2] 3 H. & C. 977.
[3] 1882, 7 App. Cas. 345.
[4] 1827, 7 B. & C. 310.
[5] 1860, 5 H. & N. 180.
[6] [1893] 67 L. T. 738.
[7] [1900] 1 Q. B. 54.
[8] 1834, 2 Cr. & M. 570.
[9] 1824, 3 B. & C. 196; 27 R. R. 322.
[10] See *Miller* v. *Race*, 1 Burr. 452.

The plaintiff, therefore, having been deprived of money, recovered part of it back again; it is hard to see how this should prevent him recovering the balance, even by another remedy.

In *Morris* v. *Robinson*[1] the plaintiff, having alternative remedies for conversion and for money had and received, applied to a Court for payment of the money, but his application was ineffective. It was held that he had not elected. But as we have seen, it is different where the application is effective: *Smith* v. *Baker*[2]. Accordingly, *Morris* v. *Robinson*[1] is no authority for a case where an application is made and granted, which happened in *Rice* v. *Reed*[3].

There the plaintiff had two alternative remedies, one for money had and received against Soltau and the Birkbeck Bank, the other for conversion against Soltau and Reed. In fact, he sued Soltau alone for conversion and, alternatively, Soltau and the Bank for money had and received. Then he applied for and obtained an interim injunction restraining Soltau from drawing out and the Bank from parting with the proceeds of the sales until the trial of the action. Of which action? we may ask. Assuredly not the action for conversion. A plaintiff, suing a defendant for the proceeds of a wrongful sale, may possibly have an injunction to restrain the defendant and his bankers from dealing with the proceeds. He may say, 'I undertake to prove that these persons are in possession of my money. If they are not I will recompense them for any loss they may sustain through being obliged to hold the money *in statu quo*. Meanwhile, and until I can in due course of law prove that the money is mine, it is fair and just that they should not be allowed to part with it.' The interim injunction is justifiable then if the plaintiff sues for money had and received.

'Look you now what follows.' A plaintiff suing for unliquidated damages in trover or conversion applies to the Court for an injunction to restrain the defendant from dealing with his balance at the bank. More than that, he applies for an injunction to restrain the defendant's bankers from honouring his cheques. The case is the same, but it appears more grotesque, if we imagine a plaintiff in an action of deceit, or still more, in an action of libel, applying for such an injunction. By the law of England a man is entitled to deal freely with his property, notwithstanding the issue of a writ for unliquidated damages, and the Court has no power to restrain him from dealing with it. In short, this injunction is not justifiable if the plaintiff sues for conversion. But 'if the party electing has done an unequivocal act, i. e. an act which would be justifiable if he had elected one way, and would not be justifiable

[1] 1824, 3 B. & C. 196; 27 R. R. 322. [2] 1873, L. R. 8 C. P. 350.
[3] [1900] 1 Q. B. 54.

if he had elected the other, the fact of his having done that unequivocal act to the knowledge of the parties concerned is an election': per Lord Blackburn, *Scarf* v. *Jardine*[1]. The plaintiff could only have obtained the advantage of having the money kept *in statu quo* on the footing that he was suing for money had and received. He could not sue for money had and received without saying that the sale of the sawdust was a valid sale. But 'a man cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say that it is void for the purpose of securing some other advantage': per Honyman J., *Smith* v. *Baker*[2], approved by the Court of Appeal in *Roe* v. *Mutual Loan Fund*[3]. He could only have got the injunction by pleading that he authorized the sale, and that the proceeds were his; but 'after succeeding by means of such a plea, he could never successfully set up' that the sale was unauthorized 'either against the' defendant 'in the action in which the plea was pleaded or any one else': per Mellor J. in Cam. Scac., *Clough* v. *London and North Western Railway*[4].

It is sometimes suggested that to apply for and obtain an interim injunction is not an unequivocal but an equivocal act, because the Court imposes on the party obtaining it an undertaking in damages, and the defendant against whom it is granted can be compensated, and is therefore not injured if the plaintiff does not prosecute the action in which he obtained the injunction. With deference, that is not the test. The test is whether the injunction, with the attendant undertaking in damages, is a proceeding equally consistent with either of the alternative remedies. If it is consistent only with one of them the plaintiff who obtains it has done an unequivocal act; for, being entitled to one only of two alternative remedies, he is not entitled to the relief incident to each of them. Suing in conversion, he was no more entitled to this interim injunction than he would have been to an order that the defendants should bring money into Court in proceedings under Order XIV.

For these reasons it is submitted that the plaintiff in *Rice* v. *Reed* elected in favour of his remedy by action for money had and received, and that he was not therefore entitled to sue the defendant for conversion.

WALTER HUSSEY GRIFFITH.

[1] 1882, 7 App. Cas. 345.
[2] 1887, 19 Q. B. D. 347.
[3] 1873, L. R. 8 C. P. 350.
[4] 1871, L. R. 7 Ex. 27.

NEGLIGENCE IN RELATION TO PRIVITY OF CONTRACT.

I.

IT is sufficiently obvious that, from a purely logical standpoint, the natural and probable consequences which the common law declares to be the measure of a man's liability for a negligent act include the likelihood that a certain individual will be injured as well as the likelihood that he will be injured in a certain manner. If, therefore, the courts had carried out that doctrine consistently, the question whether the plaintiff was one of those persons to whom the duty of exercising reasonable care was owed by the defendant, would be decided by the same standard as the question whether there was a causal connexion between the given breach of that duty and the physical changes which constituted the injury in suit. That is to say, the issue proposed would be, whether the defendant ought, as a man of ordinary sense and intelligence, to have seen that, if he should be careless in respect to the given subject-matter, persons coming within the same category as the plaintiff would probably suffer damage.

In the countries where the common law is administered, however, the course suggested by these obvious considerations has not been pursued. It is true that the courts, in dealing with one large class of cases, viz., those in which the injury was the direct result of the use of an agency which was under the immediate control of the defendant at the time when the plaintiff was damaged by it, have naturally and perforce worked out a theory of liability which confers a right of action upon the same classes of persons as would have that right if the test of reasonable anticipation had been consciously applied. Under no conceivable scheme of juridical responsibility could a defendant be heard to allege that a person who was, as a matter of fact, injured by reason of his contact with or proximity to real or personal property which the defendant then controlled, was not one of those persons whom a reasonable man would have expected to suffer injury from such contact or proximity[1].

[1] See *Elliott* v. *Hall*, 1885, 15 Q. B. D. 315, where this point is clearly brought out. It was laid down in a recent case by Lord Justice Bowen that, 'if the owner of

The applicability of the fundamental principle, *Sic utere tuo, ut alienum non laedas*, is here so manifest that there is no room for controversy as to the extent of responsibility[1]. But in the cases where this element of control cannot be treated as a determinative factor—the cases, that is to say, whose common distinctive feature is the circumstance that the plaintiff has been injured through the negligence of other parties in respect to a transaction to which he was a stranger—it is only very recently and to a very limited extent that judges have shown any willingness to determine the question whether the plaintiff was one of those persons to whom the defendant owed a duty to use care upon a theory which would ascribe a proper weight to the doctrine o" probable consequences (see X, post). This disregard of a fundamental principle has borne its natural fruit in a series of decisions which furnish as deplorable illustration as can be mentioned of the characteristic defects of 'the lawless science of our law.'

The obscurities which beset the subject have been greatly aggravated by the very unpraiseworthy ingenuity which judges have commonly exerted to confine their discussions and their rulings within the narrowest possible boundaries. Even the House of Lords which, as a general rule, is not lacking in a due appreciation of the obligations incumbent upon it, as a court of last resort in a country where most of the codification of the law must for the present be carried on by the collation of earlier decisions, has in this instance chosen the worse part. In the recent case of *Mulholland* v. *Caledonian Railway Co.*[2] it has had for the first time an opportunity of expressing its views as to the theory upon which the limits of liability for negligence should, as respects persons, be fixed; but it has failed entirely to rise to the occasion. When it is remembered how much trouble questions of the type involved have given the courts since the ruling in *Langridge* v. *Levy*[3], the contracted scope of the arguments seems to amount to a sort of dereliction of duty.

premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and invitation, of course he must take reasonable care that those premises do not injure those who are coming there'; that 'it is because he has the conduct and control of premises which may injure persons whom he knows are going to use them and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connexion with him'; and that a similar obligation and for a similar reason arises, where the thing so controlled is a chattel. *Le Lièvre* v. *Gould* [1893] 1 Q. B. 491. Compare *Heaven* v. *Pender*, 1882, 9 Q. B. D. 302, per Cave J.; *Smith* v. *Steele*, 1875, 10 Q. B. 125, per Blackburn J.; *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495, per Bovill C. J.; *Scholes* v. *Brook*, 1891, 63 L. T. N. S. 837.

[1] 'Where is the duty of care? I answer that duty exists in all men not to injure the property of others.' *Haym* v. *Culliford*, 1879, 4 C. P. D. 182, 185, per Bramwell B.

[2] [1898] A. C. 216.

[3] 1837, 2 M. & W. 519.

Unsatisfactory as this case is, however, it marks the completion of an important stage in the development of this branch of law. As a deliberate judgment of the highest court of the Empire, it will not only operate as a final settlement of such questions as actually fall within its scope, but will have a considerable influence in determining the trend of judicial opinion with respect to points upon which it does not directly touch. The time seems not inopportune, therefore, for a survey of the whole subject which is dealt with in one of its phases by this decision. It will be convenient to assume, for the sake of simplicity, that we always have to do with persons whose exposure to the dangerous conditions which caused their injury occurred while they were in the exercise of some right which it is permissible, in the present connexion, to describe as perfect. Such modifications as these principles may demand in any particular case, where the plaintiff's rights are of the inferior grade, denoted by the terms 'mere licensee,' and 'volunteer,' or 'trespasser,' can be readily supplied. It would be still more out of place, in a general investigation like the present, to take any account of the theory, elaborated by Bowen L. J., in *Thomas* v. *Quartermaine*[1], that the maxim, *Volenti non fit iniuria*, operates by negativing the existence of a duty in regard to the persons who bring themselves within its terms.

II.

The only available starting-point for an investigation which the decisions suggest seems to be the principle, that an action for injuries resulting from negligence in respect to a subject-matter which is covered by a contract cannot, as a general rule, be maintained by one who is a stranger to that contract. The discussion upon which we are entering may, therefore, be appropriately opened with the statement that this principle has been recognized in cases where the contract was one of sale[2], of bailment[3], for the manufacture of a specific article[4], for work and labour with

[1] 1887, 18 Q. B. D. 625. The observations of Lord Esher in *Yarmouth* v. *France*, 1887, 19 Q. B. D. 647 (pp. 652, 657), and of Lord Halsbury and Lord Herschell in *Smith* v. *Baker* [1891] A. C. 325 (pp. 336, 366), show that this theory has by no means found such universal acceptance that it can be placed on the same footing as the doctrines respecting the position of one who is and of one who is not invited to enter on premises or use a chattel.

[2] *Langridge* v. *Levy*, 1837, 2 M. & W. 519, 4 M. & W. 337; *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109; *Longmeid* v. *Holliday*, 1851, 6 Exch. 761; *George* v. *Skivington*, 1869, L. R. 5 Exch. 1, per Cleasby B.

[3] *Caledonian Railway Co.* v. *Mulholland* [1898] A. C. 216; *Heaven* v. *Pender*, 1883, 11 Q. B. D. 503.

[4] *Francis* v. *Cockrell*, 1870, L. R. 5 Q. B. 184, per Hannen J., *arguendo*.

reference to a chattel [1], for professional services [2], and for the transmission of telegrams [3].

III.

It can scarcely be doubted that this arbitrary doctrine is, to some extent at least, one of the inconvenient legacies bequeathed to modern English law by the old technicalities as to forms of action. The standpoint of the judges by whose decisions it was established in its present form is indicated unmistakably by the remark of Lord Abinger in *Winterbottom* v. *Wright* [4] that the cases in which the law permits a contract to be turned into a tort, except those in which some public duty has been undertaken or public nuisance committed, are all cases in which an action might have been maintained on the contract. It was considered, therefore, that the combined effect of this principle and of the rule that no one but a party to a contract can sue on it was, that in no case whatsoever can any right of action arise in favour of a stranger to the contract, as a result of the non-performance.

That there is an obvious *petitio principii* involved in the argument seems evident. It does not by any means follow that, because a party to a contract can recover in tort only when the rights acquired by his contract are sufficient to enable him to maintain an action, a person who had nothing to do with the contract, but who subsequently finds himself damaged by what the parties to it have done or left undone, should be told that he has no remedy at all. To declare such a person unable to sue on the contract itself is one thing. It is quite another thing to argue that the principle by which a party to the contract, whatever the form of his action, can recover only where he could have recovered in

[1] *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495, where a declaration was held demurrable which alleged that the defendant negligently hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure them, and that the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him. In *Elliott* v. *Hall*, 1888, 15 Q. B. D. 315, Grove J. (p. 321) said that he would have found some difficulty in arriving at the same conclusion as the Court came to in this case, but his remark, as the context shows, had no reference to the general principle stated in the text, but merely to the strictness with which the pleadings were construed.

[2] In *Robertson* v. *Fleming*, 1861, 4 Macq. 167; *Le Lièvre* v. *Gould* [1893] 1 Q. B. 493, C. A., overruling *Cann* v. *Willson*, 1888, 39 Ch. D. 39, a case of valuation of property with a view to raising money on it.

[3] *Dickson* v. *Reuter's Telegraph Co.*, 1877, 2 C. P. D. 62, 3 C. P. D. 1; *Playford* v. *United Kingdom Telegraph Co.*, 1869, L. R. 4 Q. B. 706; *Feaver* v. *Montreal Telegraph Co.*, 1873, 23 Upper Can. C. P. 150. The American cases holding a telegraph company liable to a lessee are not based on any denial of the correctness of the general principle relied on in these cases, but merely override it for special reasons. See under IV, infra.

[4] 1842, 10 M. & W. 109.

a suit directly upon the contract involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether. In the one case, as the parties have chosen to define their relations by an agreement between themselves as to the subject-matter, it is reasonable enough to say that the agreement shall be the measure of their rights in regard to the same subject-matter. But the argument which makes this principle controlling with respect to a stranger to the contract, a person who has not assented to it and has no means of securing that it shall be properly carried out, seems to savour strongly of that scholasticism which has so often led the English courts to emphasise the shadow and ignore the substance of a juridical situation[1]. It has been attempted to justify the accepted rule on broader grounds, but these will be more conveniently treated in another place (see XI, post).

The hardship of the rule is, in practice, a good deal mitigated by the various qualifications to which it is subject. These we shall now proceed to discuss.

IV.

The first two doctrines to be noticed are based on considerations which only affect a small proportion of the community.

(1) Any person who is injured by negligence in the performance of a public duty may recover damages from the persons subject to that duty, although the contract which led to his being in the situation which exposed him to the risk of injury from such negligence may have been entered into by other parties.

The familiar principle that, 'if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer[2],' would, as respects duties which are

[1] As regards contracts for the express benefit of a third person, it might be an interesting inquiry whether the rule which prevents the beneficiary from suing in them (Pollock, on Contract, 6th ed., p. 201 et seq.) can, since the supremacy of equitable over legal principles has been declared, logically co-exist with the doctrine which enables a *cestui que* trust to enforce a contract which is essentially of that character. No contract between two parties amounting to a declaration of trust in favour of a stranger could ever be enforced by the latter if courts of equity admitted the force of the theory upon which, according to Crompton J. in *Tweddle* v. *Atkinson*, 1861, 1 B. & S. 393, the common-law rule is based, viz. that it would be a 'monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, but not a party to it for the purpose of being sued.' When observed through equitable lenses, this 'monstrosity' no longer presents an alarming aspect.

[2] Best C. J. in *Henly* v. *Mayor of Lyme Regis*, 5 Bing. 91 (p. 107). See also Lord Holt's remarks in *Lane* v. *Cotton*, 1 Ld. Raym. 646 (p. 654) as to the right of action against sheriffs.

public in the sense that they are undertaken by state functionaries, plainly involve the consequences indicated by the above proposition, if such duties could legitimately be referred to an antecedent contract. But as this element is wanting in such cases, the rule as to public duties concerns us in the present connexion only in so far as it relates to duties which are deemed public, because they arise out of the pursuit of a few occupations, the essential characteristic of which is that they imply a standing offer to perform certain services for any member of the community who may demand them. All the reported decisions seem to have reference to common carriers, whose liability for injury to persons or property after they have once been received on the transporting vehicle, is, as is well settled, independent of contract [1]; but the rule would presumably be applied in an action brought against an innkeeper or a farrier [2]. A notary-public, however, whose functions would seem naturally to place them in a similar category, is held not to be liable to a person whom his negligence may collaterally injure [3]. Whether any other occupations are public within the meaning of the rule is doubtful, as the books suggest no diagnostic mark by which they can be identified [4].

It would seem that this doctrine as to public duties, though depending historically upon considerations of social expediency, might also be referred to the principle of an invitation implied from the nature of the occupations of which such duties are an incident [5]. But any speculations in this direction would be purely theoretical.

(2) Apothecaries or surgeons are liable for the unskilful treatment of their patients, although they were employed by other parties [6].

The conceptions which underlie this rule would seem to be analogous in some respects to those which are apparent in (1), but the foundation actually assigned for it by the courts, is that, under

[1] *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109; *Longmeid* v. *Holliday*, 1851, 6 Exch. 761; *Foulkes* v. *Metropolitan Railway Co.*, 1880, 5 C. P. D. 157; *Marshall* v. *York, &c. Railway Co.*, 1851, 11 C. B. 655; *Martin* v. *G. I. P. Railway Co.*, 1867, L. R. 3 Exch. 9; *Austin* v. *Great Western Railway Co.*, 1867, L. R. 2 Q. B. 442; *Dalyell* v. *Tyrer*, 1858, El. Bl. & El. 899.

[2] See the opinion of Lord Holt in *Lane* v. *Cotton*, ubi supra.

[3] *Simpson* v. *Thomson*, 3 App. Cas. 279, at p. 239.

[4] One of the grounds assigned in the United States for holding telegraph companies (see II, ante), is that by the statutes which authorize them to do business they are required to send messages for any one who may apply and, without any undue preference, are therefore virtually public agents or servants in the same sense as carriers; *Ellis* v. *American Telegraph Co.*, 95 Mass. 231. Another view is that they are actually common carriers; Shearm. & Redf. on Negl. (5th ed.) secs. 534, 535.

[5] See such cases as *Marshall* v. *York, &c. Railway Co.*; *Austin* v. *Great Western Railway Co.*; and *Dalyell* v. *Tyrer*, cited in note 1 supra.

[6] *Pippin* v. *Shephard*, 1822, 11 Price 400; *Gladwell* v. *Steggall*, 1839, 8 Scott 60, 5 Bing. N. C. 733.

any other doctrine, the defendant would virtually evade all liability, since, in the nature of the case, only the patient could prove actual damage—at all events where no loss of services is involved. This reason is interesting, as it dimly suggests the existence of a great principle, which, if admitted as a determinative factor in this class of cases, would plainly aid us greatly in putting the limits of responsibility upon a more rational basis. If such inconsistencies were not so common in English law, one might well feel some surprise that a doctor should be held responsible on this ground to a person not privy to the contract of employment, while, in other cases of professional services rendered under precisely similar conditions, the immunity of the defendant being equally inevitable unless the stranger to the contract for whose benefit it was made is permitted to sue, this consideration is not only not allowed the same weight, but, so far as the present writer is aware, has not even been discussed [1].

V.

The next two propositions exhibit the effect of doctrines which operate by carrying us altogether outside the characteristic principles of the law of negligence.

(3) The operation of the general rule that a person who creates a public nuisance is liable to any one who, being in the exercise of his lawful rights, sustains special damage therefrom, is not restricted by the fact that the nuisance resulted from the negligent performance of a contract with a third person [2].

This rule amounts simply to a statement that, if the actual consequence of a person's negligence is the creation of a nuisance, his liability is measured by the standards appropriate to that offence, and is therefore really determined without any regard to the question whether he was or was not negligent. The lower offence being, as it were, merged in the higher, it becomes quite immaterial whether the plaintiff was a stranger to the contract in the performance of which the nuisance was created. The circumstance that the material substances which constituted the injurious agency had passed out of the control of the negligent person at the time they inflicted the injury in suit also ceases to be defence under such circumstances, as is shown by the cases where a landlord is held liable for a nuisance which existed on the leased

[1] See II, ante.

[2] *Longmeid* v. *Holliday*, 1851, 6 Exch. 761, where Parke B. instanced the case where a defective bridge is erected by a contractor on a public highway. To the same effect see *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495; *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109.

premises when they were demised[1]. The essential result of the rule, therefore, is that a negligent act which produces precisely the same physical conditions may render a person liable to a much wider range of persons in one case than in another, merely because the locality in which those conditions happen to be produced renders them a nuisance—a predicament which obviously cannot be justified on logical grounds.

(4) If *A*, in carrying a contract with *B*, is not merely negligent, but is also guilty of a fraudulent misrepresentation in respect to the subject-matter, a stranger to the contract, *C*, who is injured by his reliance upon that misrepresentation may recover damages from *A*, provided he falls within the category of those persons who are permitted to claim an indemnity for fraud from one with whom they have not directly dealt[2].

The application of the above doctrine to cases of this type seems to have been originally due to the desire of the judges who decided *Langridge* v. *Levy* to turn the flank of a troublesome problem. But before long its influence was manifested in a more positive form. In two cases[3] where no such evasion of the fundamental issue was possible, these judges committed themselves without reservation to the doctrine that, where the nature of the facts is such as to exclude the conceptions of a public duty, a nuisance, and an inherently dangerous thing, fraud is not merely a possible ground, but the only ground upon which a stranger to a contract can recover damages for injuries traceable to its non-performance. Whether there can be a recovery under this doctrine is obviously a mere

[1] *Rosewell* v. *Prior*, Case 6, 2 Salk. 460, approved in *Cheetham* v. *Hampson*, 4 T. R. 318, per Buller J., p. 320; *Rich* v. *Basterfield*, 4 C. B. 783; *Gandy* v. *Jubber*, 5 B. & S. 78, 9 B. & S. 15.

[2] *Langridge* v. *Levy*, 1837, 2 M. & W. 519; 4 M. & W. (Exch. Ch.) 337. See the comments on this case by Alderson B., in *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109 (p. 115); Parke B., in *Longmeid* v. *Holliday*, 1851, 6 Exch. 761; and Page Wood V.-C., in *Barry* v. *Croskey*, 1861, 1 John. & H. 1. It was also expressly stated in *Blakemore* v. *Bristol, &c. Railway Co.*, 1858, 8 El. & Bl. 1035 that wilful deceit was the ground of the decision (p. 1050).

[3] *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109; *Longmeid* v. *Holliday*, 1851, 6 Exch. 761. The opinion of Cave J., in *Heaven* v. *Pender*, 1883, 9 Q. B. D. 302, shows that he regarded the law as being settled in this sense, and although the actual judgment of the Queen's Bench Division was reversed by the Court of Appeal (11 Q. B. D. 503), the reversal had no reference to this theory. The comment of Brett M. R. on *Langridge* v. *Levy*, supra, that, 'taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground, in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud' (*Heaven* v. *Pender*, L. R. 11 Q. B. D. 503, 512), seems to be shaped by a wish to minimize the effect of the case as one adverse to his own theory, to be noticed hereafter (see X, post). The later decisions by the same Court, as just cited, leave no doubt as to the intention of the judges to negative the plaintiff's right to recover, if his action had sounded in negligence alone. In *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495, all the judges conceded that the plaintiff might have recovered, if he had established fraud.

question of fact, Was the defendent guilty of a fraudulent representation, and was the plaintiff one of those persons who have a right to be indemnified for injuries caused by reliance on that representation? Here again, as in (3), the doctrine operates so as to make the defendant's negligence, though in a different way, an immaterial factor, except in those cases where it is of that reckless and wilful character which is assimilated to fraud for reasons fully explained in *Le Lièvre* v. *Gould*[1] and other cases.

VI.

The next doctrine to be noticed is one which is referable to the conception that specially stringent obligations are incurred by those who undertake to deal with material substances of certain classes.

(5) A person who uses or leaves about in such a way as to cause danger an instrument which is dangerous in itself is liable, independently of contract, to any one who is injured thereby.

This proposition closely follows the words of Romer J. in *Scholes* v. *Brook*[2], expressly approved by Lord Justice Bowen in *Le Lièvre* v. *Gould*[1]. The doctrine which it embodies is apparently traceable to *Dixon* v. *Bell*[3], where the injury was caused by the carelessness of the defendant's messenger in handling a loaded gun. Yet it seems very dubious whether the court which decided that case intended to do more than apply the principle that consummate care is obligatory in dealing with specially dangerous articles. The gist of the ruling is merely that the jury was justified in finding that the defendant did not take the precautions which a prudent man would have taken in a case where a young and thoughtless girl was sent to fetch a gun known to be loaded, the view of Lord Ellenborough being that the message to the person in charge of the weapon should at least have instructed him to draw the charge instead of the priming merely. The defendant being delinquent in this respect, the case becomes simply one of an agent's negligent execution of negligent instructions, the result of which would of course be to fasten a joint and several liability both upon the principal and upon the agent. In view of the subsequent development of the law on this subject, however, the correct construction of this case has become immaterial. It is now well settled that the range of responsibility, in respect to persons, is wider where the injurious agency is a thing 'dangerous

[1] [1893] 1 Q. B. 493. [2] (1891) 63 L. T. N. S. 837.
[3] (1816) 5 M. & S. 198, 17 R. R. 308.

in itself' or 'imminently dangerous' than where it does not come under that category. For aught that appears, the duty to deal with such things carefully seems, like the duty to avoid creating a nuisance, to be owed to all the world. The existence of a duty of this extent is not, at all events, negatived by any of the considerations which have been deemed fatal to the plaintiff's right of action in cases where the injurious agency was not of this character[1].

VII.

The most serious practical difficulty involved in the application of this doctrine is that no really adequate scientific test has ever been, or perhaps can be suggested, by which it can be determined whether an injurious agency does or does not belong to the category of things dangerous in themselves. As a sober matter of fact, considered without reference to the subtleties of legal construction, it is impossible to deny that, under certain circumstances, things which are normally quite safe to persons who handle or come into proximity to them change their character so completely as to be fraught with fully as much peril to such persons as the loaded gun in the *Dixon* v. *Bell*, supra—supposing, that is to say, that the dangerous conditions are, as in that case, not apparent. Shall we say then that, as has been declared by the New York Court of Appeals, the distinguishing characteristic of things which are imminently dangerous in themselves is that 'serious injury' to any persons using them is a natural and probable consequence of such use[2]? The acceptance of this test would necessitate the adoption of the theory laid down in the case cited, that a defective scaffold is a thing essentially dangerous, and the same reasoning would be equally applicable to many other industrial agencies and articles of commerce. Even in New York, however, the courts have shrunk from the conclusion to which their own logic points[3],

[1] See *Longmeid* v. *Holliday*, 1851, 5 Exch. 761, per Parke B.; *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495, per Willes J.; *Heaven* v. *Pender*, 1883, 11 Q. B. D. 503, per Cotton L. J.; *Caledonian Railway Co.* v. *Mulholland* [1898] A. C. at p. 218, per Lord Shand. See, however, the remarks of Baron Parke in *Langridge* v. *Levy*, 1837, 2 M. & W. 519, referred to in XI, post.

[2] *Devlin* v. *Smith*, 1882, 89 N. Y. 470.

[3] *Losee* v. *Clute*, 1873, 51 N. Y. 494 (steam boiler not a dangerous instrument); *Loop* v. *Litchfield*, 1870, 42 N. Y. 351 (same decision as to fly-wheel which burst); *Burke* v. *De Castro*, 1877, 11 Hun. 354 (same decision as to defective hoisting-rope). It should be noted, however, that all these rulings preceded that in *Devlin* v. *Smith*, supra, and that the last one has been formally overruled in *Davies* v. *Pelham*, 1892, 65 Hun. 573, affirmed without opinion in 146 N. Y. 363 (derrick for hoisting heavy stones). Other American courts seem to have uniformly refused to extend the liability of manufacturers and vendors on this ground beyond their immediate transferee. See *Ziemann* v. *Kieckhofer*, 1895, 90 Wisconsin Rep. 497 (goods elevator); *Heizer* v. *Kingland, &c. Co.*, 1892, 110 Missouri Rep. 105 (threshing-machine); *Reddy* v. *Missouri Pacific Railway Co.*, 1891, 104 Missouri Rep. 234, 12 Law. Rep. Ann. 746

and such a theory would, of course, be quite irreconcilable with the series of English cases which begins with *Langridge* v. *Levy*[1]. So far as the actual decisions go, it would seem that the rule as to things dangerous is in this country restricted to explosives[2], though it is not improbable that, if the question were actually presented, the judges might follow the American decisions which extend it to poisonous drugs[3].

In its present shape, therefore, this rule seems to be of a very slender juridical value, its operation being confined to a small class of articles, the boundaries of which it is difficult, if not impossible, to fix on any logical grounds. The law of the subject, however, might be placed upon a more rational foundation, if cases of this type were referred, as they might well be, to the principles upon which a duty is in some cases predicated to impart information as to the dangerous qualities of substances which a person allows to pass out of his immediate control (see (8) post, and the cases cited in note 1, on the next page). On the one hand, it would be difficult to suggest any sound reason why the things which are regarded as 'dangerous in themselves' should not, for the purposes of legal liability, be held to be removed from that category by the proof that the person injured by them was aware of their true character. At all events it is clear that, under such circumstances, the maxim, *Volenti non fit iniuria*, would in most instances furnish a perfect protection to a defendant. On the other hand it seems undeniable that the courts, in establishing the doctrine imposing a more than usually stringent rule of responsibility upon those who deal with things of this kind, have been much influenced by the fact that the persons who will handle or come into proximity to them, after they have left the possession of the original transferor, are commonly, in the very nature of the case, ignorant of the dangers to which contact or proximity will expose them[4].

(defective brakes; compare Lord Shand's opinion in the *Mulholland* case, note 1, p. 177, supra); *Goodlander Mill Co.* v. *Standard Oil Co.* (Circ. Ct. of App. 1894) 63 Fed. Rep. 400 (crude petroleum); *Bright* v. *Barnett*, 1894, 88 Wis. 299, 26 Law. Rep. Ann. 524 (defective scaffold); *Smith* v. *Onderdonk*, 1898, 25 Ont. App. 171 (defective locomotive).

[1] 2 M. & W. 219. See also the remarks of the judges in the cases cited in the notes to V, supra. Compare the remark of Lord Justice Bowen that the law of England 'does not consider that what a man writes on paper is like a gun or other dangerous instrument, and unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.' *Le Lièvre* v. *Gould* [1893] 1 Q. B. 493 (p. 502), approving a dictum of Romer J. in *Scholes* v. *Brook*, 1891, 63 L. T. N. S. 837.

[2] See the cases cited in notes to VI, supra. Compare *Parry* v. *Smith*, 1879, 4 C. P. D. 325 (gas exploded); *Wellington* v. *Downer, &c. Co.*, 1870, 104 Mass. 64 (inflammable oil).

[3] *Thomas* v. *Winchester*, 1852, 6 N. Y. 397; *Norton* v. *Sewall*, 1870, 106 Mass. 143.

[4] In the American cases as to the sale of poisonous drugs—see the last note—much emphasis was laid on the fact that the plaintiff did not know, and had no reasonable means of knowing, that the drug was dangerous.

In some cases the special duty alleged to have been violated in regard to articles exceptionally dangerous was that of notifying the transferee of their properties[1], and although the language used by the judges seems to show that they viewed the injurious agency merely as things which required more care and caution than ordinary merchandise[2], rather than as things inherently dangerous in the sense with which we are now concerned, the analogy is sufficiently close to justify vouching these decisions in aid of our position, that a rule essentially identical in its practical results with that formulated in (5) above, and far more precise and rational, would be secured if the courts were simply to lay it down that one who transfers an exceptionally dangerous thing does not exercise the measure of care which the circumstances demand, unless, at the time of the transfer, he sees that the transferee is not under any misapprehension as to its properties, and that for an omission to discharge this duty he must respond in damages to any one, whether a remote transferee or not, whom the article injures while its properties remain undisclosed and undiscovered by the persons through whose hands it passes.

VIII.

A rule expressed in this form would place the liability for injuries caused by articles of this class on the same basis as that to which a person who has created a trap is subject. In fact it would seem that the only essential difference between a trap and a thing dangerous in itself is that the former expression refers to the condition of real property or of chattels affixed more or less permanently to real property, while the latter suggests a chattel of an essentially movable character, considered without any relation to locality[3]. That there is, apart from contractual relations, a duty incumbent on the owner of premises to inform persons who rightfully enter thereon of anything in the nature of a trap, is well

[1] *Brass* v. *Maitland*, 6 El. & Bl. 470; *Farrant* v. *Barnes*, 1862, 11 C. B. N. S. 553; *Lyell* v. *Ganga Dai*, 1875, Ind. L. R. 1 All. 60, where the persons injured were the servants of a carrier to whom the dangerous article had been delivered for transportation; *S. P. Standard Oil Co.* v. *Tierney*, 1891, 92 Kentucky Rep. 367; 14 Law. Rep. Ann. 677.

[2] See especially the opinion of Willes J. in *Farrant* v. *Barnes*, supra.

[3] The following remark of Willes J. in *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495 shows the close affinity between the two classes of cases: 'The chandelier is to be regarded as movable property, and the declaration should have shown either that it was a thing dangerous in itself, and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. If that averment had been made and proved the case might fall within the class to which *Sullivan* v. *Waters*, 14 Jr. C. L. R. 460 belongs—as a trap to persons using or likely to use the way whether public or not.' For a similar blending of the two conceptions, see *O'Neil* v. *Everest* [1891] 61 L. J. Q. B. 451; *Devlin* v. *Smith*, 1882, 89 N. Y. 470.

settled [1], the theory being, as the word itself shows, that they may, in the absence of notification, be led by a feeling of false security to do something which, if they had understood the conditions, they would have left undone. As the situation thus predicated is obviously the same in all essential respects as that which arises when a person 'uses or leaves about' one of those things which are dangerous in themselves, it would seem that the liability in both instances might not unjustifiably be referred to the same considerations. In both classes of cases, it will be remarked, there are intimations more or less distinct of a comprehensive principle towards which the law may possibly be advancing, and which would create a right of action in favour of any member of the community who might be injured by handling or coming into proximity to property in which there is a latent danger, which the defendant, although he had become aware of its existence before the property had passed out of his custody, had failed to disclose to his immediate transferee.

IX.

In the next proposition the principle of an invitation emerges into prominence.

(6) If it is agreed, as an incident to a contract between *A* and *B*, for the performance of work on *A*'s premises, that *A* shall furnish certain appliances to facilitate the work, and it is contemplated that *Z* and the other persons employed by *B* to do the work will put these appliances to immediate use, *A* remains responsible, during a reasonable period after the appliances are placed at the disposal of *Z*'s master, for injuries caused by defects in the appliances which might have been discovered by a proper inspection.

This seems to be the actual effect of the much discussed case of *Heaven* v. *Pender* [2], though it is also cited as an authority for much wider propositions. Construed in this manner it simply means that the doctrine of *Indermaur* v. *Dames* [3], which obliges the owner of premises to use care to keep them in safe condition for the use of

[1] *Membery* v. *Great Western Railway Co.*, 1889, 14 App. Cas. 179, per Lord Halsbury (p. 184). See also *Indermaur* v. *Dames*, 1866, L. R. 1 C. P. 274 (p. 289); *Smith* v. *London, &c. Docks Co.*, 1868, L. R. 3 C. P. 326. This duty is owed even to mere licensees. *Gautret* v. *Egerton*, 1867, L. R. 2 C. P. 375; *Bolch* v. *Smith*, 1862, 7 H. & N. 736.

[2] 11 Q. B. D. (C. A. 1883) 503, reversing the decision of the Queen's Bench Division (9 Q. B. D. 302), which turned upon the theory that the fact of the scaffold's having passed out of the defendant's control at the time of the accident was a conclusive bar to the action. Some years previously the same conclusion as to similar facts had been arrived at in Massachusetts. *Mulchey* v. *Methodist, &c. Soc.*, 1878, 125 Mass. 487.

[3] L. R. 1 C. P. 274.

workmen who enter thereon to do something in which he is interested, even though they are not directly employed by him, is also the measure of his duty with regard to any chattels which he may furnish them to facilitate their work [1].

The decision shows that it is less easy to divest oneself of responsibility for the condition of a chattel where it is transferred by way of bailment than where it is transferred by sale [2]. How long that responsibility remains with a bailor under the circumstances shown is a point left in uncertainty by the opinion of Cotton L.J., but from the stress which he lays on the fact that the appliance was furnished for 'immediate use,' and the language used by the Lords Justices in *Hopkins* v. *Great Eastern Railway Co.*[3], it seems a legitimate inference, that the bailor would be held answerable until the bailee discovered that the appliance was defective or, failing such discovery, until such time as duty arose on his part, to subject it to a reasonably careful examination.

The essential grounds of distinction between *Heaven* v. *Pender* and the recent ruling in *Caledonian Railway Co.* v. *Mulholland* [4] are not easy to define. It was held in the latter case that an arrangement by which one carrier *A*, after transporting goods to the point specified in his agreement with the shipper, allows a connecting carrier *B*, for his own convenience, to draw the vehicle with their loads to a place designated by the party to whom *B* has contracted to deliver the goods, does not create, in favour of the servants of *B* who will handle the vehicles, an obligation on *A*'s part to examine the vehicles in order to ascertain whether they are in a safe condition for the additional journey. If we could suppose that the controlling factor was that there was a gratuitous loan of the wagons, we should at once have an intelligible basis of differentiation, for, upon the principle noticed in X, post, the first carrier could not be held liable to the servants of the second except for such injuries as resulted from defects in the wagons which were actually known at the time of the transfer and not disclosed to the transferee. This view of the situation is not distinctly negatived by anything said in the opinions [5], nor are the prior decisions

[1] See the comments of Lord Herschell in the case of *Mulholland* v. *Caledonian Railway Co.* [1898] A. C. 216.

[2] See the cases cited in II, note 2, p. 170, which all assume that, as regards strangers, the vendor's liability ceases when the transfer of the chattel is complete, unless he can be held for one of the special reasons afterwards commented on in section IV, et seq.

[3] 1896, 60 J. P. 86.

[4] [1898] A. C. 216.

[5] Lord Shand considered that it was immaterial whether the vehicles were lent gratuitously or for a valuable consideration, as in either case the contract would be *res inter alias acta*, and could not be taken advantage of by strangers, such as the servants of the second carrier. But this remark seems to be a reaffirmation of the well-established doctrine that the servants of the second carrier could not sue on the contract of their master with the defendant (see II, ante).

establishing the principle in question even referred to; but it seems to supply the simplest solution of the issues raised by the evidence. Another possible standpoint would be to regard the two cases as illustrating the antithesis between the positions of one who is invited and of one who is not invited to use a chattel [1]. The rule which this construction would suggest is that the bailor of chattels is liable, independently of contract, for injuries caused by discoverable defects in such chattels, where the injured person is one who used them on the bailor's premises to execute work in which the bailor had an interest, but not where such person was using them merely by the bailor's permission for the accomplishment of some object in which the bailor had no interest—especially where the loan involves the removal of the chattels from the bailor's premises. But as their Lordships have not thought fit to explain what they consider to be the true relation of this most unsatisfactory decision to those with which it comes in contact, both these theories as to its meaning must remain mere matters of surmise.

X.

In the doctrines so far noticed the consideration which, as was pointed out at the beginning of the article, furnishes the only test by which it can be determined on logical grounds whether the plaintiff was a person to whom the defendant owed a duty to use care is only inferentially involved. It is evident, however, that the general rule itself which we have been discussing and the rationale of some of the exceptions to it require us to assume the existence of a principle which may be formulated thus:—The mere fact that the defendant, if he had thought at all about the possible consequences of his negligence, must have seen that the dangerous conditions created by such negligence were likely to produce injury to persons coming within categories susceptible of ready ascertainment, will not render him liable for injuries which one of those persons may suffer by reason of the existence of those dangerous conditions [2]. Some individual judges have undertaken to construct a theory of liability upon lines which would make this likelihood of injury to a particular person the controlling factor in every case [3]. But the actual decisions cut down the

[1] See *Pingree* v. *Leyland*, 1883, 135 Mass. 398.

[2] See *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109; *Langridge* v. *Levy*, 1837, 2 M. & W. 519; *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495; *Longmeid* v. *Holliday*, 1851, 6 Exch. 761; *Caledonian Railway Co.* v. *Mulholland* [1898] A. C. 216.

[3] See the formulae suggested in XI, post, and the remarks of Chitty J. in *Cann* v. *Willson*, 1888, 39 Ch. D. 39. In *Cunnington* v. *Great Northern Railway Co.*, 1883, 49 L. T. N. S. 392, Brett M. R. defended the decision in *Dickson* v. *Reuter's Telegraph Co.*, 2 C. P. D. 62, 3 C. P. D. 1, on the ground that it would be idle to argue that

above principle no further than appears in the two next propositions.

(7) Where a chattel is supplied for a specific purpose, whether by a bailment for a valuable consideration, or by a sale, a person who is injured by reason of its being unfit for that purpose may, although not privy to the transaction, recover damages from the transferor, if he was informed that such person was to use the chattel [1] or it is apparent that, in the nature of the case, he will use it [2].

(8) It seems that one who lends gratuitously a chattel to be used for a specific purpose is liable for injuries received by the bailee's servants, where it is in an unfit condition for use owing to defects which the lender was aware of and failed to disclose to the bailee [3]. But in any event the lender does not owe such servants the duty of examining the chattel in order to ascertain whether it is defective [4].

The second of these propositions is not stated in positive terms, for the reason that the plaintiff in the three cases cited was, as

a telegraph company were bound to come to the conclusion that, whatever telegram they misreported, there must be an injury to the person to whom it was misreported. This comment is not very easy to reconcile with the learned judge's general statement of principles in *Heaven* v. *Pender*, 11 Q. B. D. 503, which he reiterated in *Cunnington's* case (see XI, post). That some damage should result is surely a natural consequence of an error in a message.

[1] *George* v. *Skivington*, 1869, L. R. 5 Exch. 1, where a hairwash which proved deleterious was bought for the plaintiff by her husband. In the case next cited Lord Esher stated the effect of this case as follows: If a tradesman supplies an article under such circumstances that he must, or ought to have known, if he had thought about it, that the article would be used by other persons besides the purchaser, he owes a duty to those other persons, by reason of his knowledge that they will probably use it.

[2] *Hopkins* v. *Great Eastern Railway Co.*, 1896, 60 J. P. 86, C. A., where the plaintiff was the servant of one who had hired a coal-shoot from the defendants. All the judges argued upon the assumption that it was their duty to use care in seeing that the shoot was in good condition at the time it was transferred to the hirer, inasmuch as its use by the workmen must have been contemplated. Lord Esher expressly assimilates the situation to that presented in *George* v. *Skivington*, supra. Kay L. J. thought the case came under the principle of *Heaven* v. *Pender* (see IX, ante), the effect of which he conceived to be 'that, where a dockowner supplies a shipowner with staging which, in the nature of things, will be used by third persons, there is a duty on the part of the person who supplies the staging towards such persons to see that the staging is, at the time it was supplied, fit for the purpose for which it was intended, but not that it shall remain in that condition.' This comment indicates clearly enough the standpoint of the court, though it seems to ascribe a much greater importance to the defendant's contemplation of the plaintiff's use of the scaffold, as a probable event, than the opinion of Cotton L.J. warrants. The statement recently hazarded by a member of the Ontario Court of Appeal in *Smith* v. *Onderdonk*, 1898, 25 Ont. App. 171, that the *only* grounds on which the bailor could be made liable in a case of this type were misrepresentation or fraudulent suppression, is clearly quite inconsistent not only with the *Hopkins* case which was not cited, but with *Heaven* v. *Pender* which was relied upon.

[3] *Blakemore* v. *Bristol &c. Railway Co.*, 1858, 8 El. & Bl. 1035 J. followed in *MacCarthy* v. *Young*, 1861, 6 H. & N. 329, and *Coughlin* v. *Gillison* [1899] 1 Q. B. 145, C. A.

[4] *Coughlin* v. *Gillison*, ubi cit.; *Caledonian Railway Co.* v. *Mulholland* [1898] A. C. 216, referred to in IX, ante, seems to be another case in which this principle, though not relied upon, is necessarily implied.

a matter of fact, denied recovery on the ground that the defendant had no knowledge of the defects in the chattels lent. But the reasoning in the *Blakemore* case seems to imply that he would have been allowed to maintain the action if he had been, instead of a mere volunteer, a servant regularly employed by the bailee. Supposing this to be a justifiable inference, the principle underlying this ruling and those in which it has been followed would be, that the duty to warn the bailee as to defects in the chattels lent enures to the benefit of any person besides the bailee, who is morally certain to use them. A servant of the bailee would obviously belong to this category, where the chattel lent was an industrial appliance which is either customarily operated by servants, or which must be so operated for the reason that the bailee cannot manage it without assistance.

It would seem from the cases cited under (7) and (8), that the courts, although they have not formulated such a principle in express terms, have proceeded on the theory that, as regards persons whom the transferor of a chattel is bound to take into his calculations as being likely to use it, the essential difference between the obligations resulting from a gratuitous transfer, and from a transfer upon valuable consideration, is that in the former case his duty is limited to informing the transferee as to defects of which he has actual knowledge, while in the latter case his duty extends to examining the chattel with reasonable care before it leaves his possession.

It will be observed that the facts presented in the cases under this head, which involve a bailment, are closely analogous to those in which an implied invitation is treated as the controlling factor. But the principle upon which they are based is of wider scope than that of an invitation, which, as the authorities now stand, can scarcely be considered to cover more than the predicaments which imply either actual control or, as in *Heaven* v. *Pender*, supra, what may be termed the constructive control which is supposed to have continued for a period, varying in length according to circumstances, after the injurious agency has left the possession of the party charged with culpability.

XI.

We must now consider the attempts which have been made to introduce some order into the chaos which, as the foregoing digest of the decisions only too clearly shows, has resulted from undertaking to solve, by means of a number of isolated doctrines, between

which there is little or no correlation, a class of problems which are identical as respects one essential element.

In one of the earliest of the cases, upon which we have commented above, plaintiff's counsel endeavoured to procure the acceptance of the doctrine that, wherever a duty is imposed by contract or otherwise, and that duty is violated, any one who is injured by such violation may recover damages from the wrongdoer[1]. Parke B. declined to discuss this argument, preferring to rest his decision on the grounds already mentioned (V, ante), but said that he would hesitate to concede the correctness of the proposed doctrine even in the case of things dangerous in themselves. The same argument was again rejected in *Winterbottom* v. *Wright*[2], and is impliedly negatived in all the later decisions cited above[3]. For practical lawyers, therefore, the suggested theory possesses a mere historical interest, representing one of the abortive endeavours which have at various times been made to broaden and rationalize the foundations of our law. Yet, if the right of contracting is a form of property, which will scarcely be denied[4], the rejected doctrine is clearly nothing more than an application, in a liberal sense, of the maxim *Sic utere tuo, ut alienum non laedas*, and upon this basis it would find a place in any scientific system of jurisprudence[5].

A theory of responsibility which has a much better chance of ultimately obtaining a foothold in our law is that formulated in the following well-known passage of Lord Esher's opinion in *Heaven* v. *Pender*[6]:—

'Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'

In another case, decided a few months later, we find the learned judge reiterating the same theory in somewhat different terms:—

'Wherever the circumstances disclosed are such that, if the

[1] *Langridge* v. *Levy*, 1837, 2 M. & W. 519. [2] 1842, 10 M. & W. 109.

[3] See also *Alton* v. *Midland Railway Co.*, 1865, 19 C. B. N. S. 213. In the unqualified form in which it was couched, it obviously could not prevail even as to statutory duties since the decision in *Atkinson* v. *Newcastle, &c. Works*, 2 Ex. D. 44.

[4] [Many English lawyers would certainly deny it.—Ed.]

[5] It is by reasoning on the lines here suggested that an American writer of repute has undertaken to justify the decisions by the courts of the United States to the effect that a telegraph company owes a duty to the receiver of a telegram. Bigelow, Leading Cases on Torts, p. 626.

[6] 1883, 11 Q. B. D. 503.

person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or his property, then there is a duty shown to use reasonable care[1].'

In the same case Lord Justice Fry furnished a third formulary:—

'One may lay down with some safety that, where a man without contract does something to another man, and the first man knows that, if he does the act negligently, that negligence will in all probability produce injury to the person or property of the second man, there the first man owes the second a duty to do the act without negligence.'

These propositions, it will be observed, bring out with reasonable clearness the fundamental fact noticed at the beginning of this article, that the likelihood of a certain person's being injured is as much within the scope of the natural and probable consequences for which a negligent person is liable, as the likelihood that the physical event which constitutes the injury will occur. At present, however, it must be admitted that, logically unexceptionable as they appear to be, the opinion of the majority of the Court of Appeal in *Heaven* v. *Pender*, supra, as well as the reasoning in the case of *Caledonian Railway Co.* v. *Mulholland*[2], must be taken to show that they are not yet accepted as correct statements of the law. That they could not be accepted without overruling at least a part of the cases cited above is manifest. In subsequent cases even Lord Esher seems somewhat to restrict the scope of his doctrine by declaring that the duty upon the breach of which an action for negligence is founded is that a man is bound not to do anything negligently so as to hurt a person near him, and that the whole duty arises from the knowledge of that proximity[3]. Whether he really intended to recede from his original views is hard to say; but evidently it would be necessary to strain this later language very considerably to make it cover the cases which are really the most troublesome of all, viz. those in which the injurious agency was not under the defendant's control at the time of the accident.

XII.

Our article may be appropriately concluded by some brief criticisms on the *argumenta ab inconvenienti* by which certain judges

[1] *Cunnington* v. *Great Northern Railway Co.*, 1883, 49 L. T. N. S. 392.
[2] [1898] A. C. 216.
[3] *Thomas* v. *Quartermaine*, 1887, 18 Q. B. D. 685 (p. 688); *Le Lièvre* v. *Gould* [1893] 1 Q. B. 491. Compare also the language used by Smith L.J. in the latter case (p. 504).

have undertaken to justify the present limitations of the range of responsibility.

In that class of cases in which a person loses a benefit intended for him, owing to the negligence of a professional man in carrying out the instructions of another party, the doctrine that the loser of the benefit cannot claim damages for such negligence has been defended on the ground that to allow such an action would lead to the result that a disappointed legatee might sue the testator's solicitor for negligence in not causing the will to be duly signed and attested, though he might be an entire stranger both to the solicitor and the testator[1]. Here, under the circumstances supposed, the solicitor could not be called to account by his employer, who, by hypothesis, would be dead when the delinquency bore its fruits, nor by the representatives of the decedent, who would obviously be profited rather than damaged by the negligence which invalidated the legacy. The argument, therefore, was simply an attempt to justify the refusal of a right of action to the only person who could show actual damage by adducing a similar case in which the professional man would also escape scot-free if he could not be sued by the person injured. Surely a very neat and convincing piece of logic! The reasoning here employed is, as we have already pointed out, wholly inconsistent with that which is used to sustain the right of a patient to sue a medical man not retained by him. (See IV (2) ante.)

In another class of cases great reliance has been placed upon an argument of a somewhat similar stamp, viz. that it would be unjust, after a contractor for the supply of some article of commerce has done everything to the satisfaction of his employer, to allow the transaction to be reopened by one not privy to it. The credit, such as it is, of first promulgating this theory, is apparently due to the judge whose fertile imagination clinched the doctrine of the servant's assumption of the risks of his employment by reasoning of a like sort[2]. In *Winterbottom* v. *Wright*[3], where it was held that a manufacturer who had furnished the Postmaster General with a coach for which another person supplied the drivers and horses was not liable to one of those drivers for an injury caused by the breaking of a defective axle, Lord Abinger was strongly influenced by these considerations: 'If the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts

[1] *Robertson* v. *Fleming*, 1861, 4 Macq. H. L. 167.
[2] See *Priestley* v. *Fowler*, 1837, 3 M. & W. 1.
[3] 1842, 10 M. & W. 109.

as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.' The same kind of language also makes its appearance in later cases [1].

The argument seems to amount, broadly speaking, to this: that to compel a negligent workman to indemnify each and every person who might be injured by his negligence would be inexpedient and unjust, for the reason that it would widen unduly the circle of liability, thus producing excessive intricacy of actions, and creating conditions of responsibility which would deter prudent men from engaging in certain occupations. As to the first of the results here held out *in terrorem*, it seems sufficient to say that, even if the practical difficulties involved in the task of fixing responsibility upon the proper party were in some cases as grave as the argument assumes, it does not by any means follow that the courts should decline the task altogether. With regard to the suggested discouragement of enterprise, the ground might be taken reasonably enough that, until the matter has been brought to the test of experience, the burden of proving that this would be the consequence of widening the circle of responsibility, lies upon those who make the assertion, and that this burden is not discharged by the mere *ipse dixit* of any judge, however eminent he may be. Indeed one might go still further and say that, as this argument emanated originally from a judge whose arguments of a very similar type, in support of the doctrine of common employment, have been signally confuted by the logic of events since the abolition of that doctrine by the Employers' Liability Act of 1880, his reasoning is rather more likely than not to be unsound. The plain truth of course is that the opinion of a lawyer upon the probable operation of economic forces is of just as great or as little value as that of a layman of equal intelligence and with the same knowledge of the subject.

Nor is this all. It is, we think, not by any means difficult to show that the inconveniences to which it is declared that manufacturers and vendors of chattels would be subjected by holding them liable to strangers are much less serious than the courts would have us suppose. To read the passages in which judges have expatiated upon the withering effects of an extension of liability one would imagine that a single defect in a chattel might be pregnant with peril to a limitless number of people. Yet a little consideration will show that a long succession of accidents from any particular imperfection in the same article, though theoretically possible, would be quite inconsistent with the ordinary experience

[1] It will be sufficient to instance the remarks of Willes J. in *Collis* v. *Selden*, 1868, L. R. 3 C. P. 495.

of every-day life. Such a defect almost invariably exhausts its potential capacity for mischief when it has produced its first injury after the article has left the possession of the manufacturer or seller; for, in the normal course of business, the occurrence of a single accident suggests and brings about the disuse of the article or its restoration to a state of good repair. And in any event, after the existence of the defect has been revealed by the infliction of an injury or otherwise, the responsibility for the future condition of the article will, upon undisputed principles of legal causation, be shifted to the person in possession. There is no apparent reason, therefore, why the responsibility should not in any event remain with the manufacturer or seller until the defect has been actually brought to light by an accident, or until a duty falls on the person in possession to examine the article for the purpose of ascertaining whether its quality has deteriorated, and there is at least one good reason why this doctrine should prevail. Evidently the present rule will not infrequently so operate that no one at all can be brought to account for injuries caused by a dangerously defective chattel—a situation much more 'outrageous' than any of those which have suggested themselves to Lord Abinger and other judges. Such a case arises where the inspection which would have led to a disclosure of the defect is one which it was the duty of the seller to make, but which it would be unreasonable to require the purchaser to make, as where the defect could not have been discovered without special skill and knowledge, which the seller possesses and which the purchaser usually lacks. Transactions presenting this feature occur whenever a manufacturer sells machinery or a chemist sells drugs. As a general rule, the customers would be justified in assuming that the articles bought are in such a condition that they may be safely used, although they may have latent defects of which the vendors should have been aware[1]. Hence, if a stranger to the transaction, such as a servant of the purchaser, suffers injury from a defect in the machinery, the effect of the present rule will often be that he cannot claim an indemnity from the manufacturer or vendor because there is no contract between them, nor from the purchaser because he has not been wanting in due care. The injustice of denying a remedy under these circumstances against the only person who has been

[1] See the comments of Brett M. R. in *Cunnington* v. *Great Northern Railway Co.*, 1883, 49 L. T. N. S. 392, on *George* v. *Skivington*, 1869, L. R. 5 Exch. 1. The doctrine stated in the text is clearly a necessary corollary from the principles which define the relations between an independent contractor and his employer, and is so treated by the American courts in the cases which have established the right of a purchaser to rely to a very great extent on the quality of an article bought from a reputable manufacturer. See *Carlson* v. *Phoenix Bridge Co.*, 1892, 132 N. Y. 273; *Reynolds* v. *Merchants Woollen Co.*, 1897, 168 Mass. 501.

guilty of negligence is not disguised by the use of the convenient expression, *damnum absque iniuria*[1]. The supposed situation, in fact, whatever gratification it may afford to a connoisseur of logical dilemmas, is simply shocking to common sense. That modern judges, with a few exceptions, should still refuse to admit that there is anything incongruous or unsatisfactory in the doctrines which lead up to it, shows how far even the most robust intellects may, under our system of case law, be carried away from a scientific theory of responsibility by following precedents which, when analysed, seem to rest on no more solid basis than doubtful inferences from the mere technicalities of pleading and equally doubtful considerations of social and economic expediency.

C. B. LABATT.

[We are unable to discover in Mr. Labatt's ingenious but, in our opinion, paradoxical argument, any recognition of the distinction between misfeasance and non-feasance, or the difference between liability for one's own acts (including acts of one's servants in the course of their employment) and the liability of an insurer. Neither does Mr. Labatt allege that civilized systems other than the Common Law—the law of the Province of Quebec, for instance—are more favourable to his own view. We have not heard of the decision in *Caledonian Railway Co.* v. *Mulholland*—where, by the way, English authorities were not binding, and could have only a persuasive authority on their merits—being disapproved by any one before Mr. Labatt. No doubt it was once a current view that if *A* has made a contract with *B*, this excludes or limits any liability of *A* to *Z*, apart from contract, arising out of an act which as between *A* and *B* is a breach of the contract. Such a view is no longer tenable. But Mr. Labatt seems to hold that *A* is to be liable to *Z* merely because *A* has broken his contract with *B* and *Z* has suffered consequential damage. This, it is submitted, goes as much too far the other way. The question between *A* and *Z* is a question of a general duty of care and caution, which duty arises from *A*'s acts and position with regard to *Z*, not from *A*'s promises to *B*. Contractual duty, if any, may be co-extensive with independent duties, but is no measure of them.—ED.]

[1] See the opinion of Rolfe B. in *Winterbottom* v. *Wright*, 1842, 10 M. & W. 109.

A HUSBAND'S LIABILITY FOR HIS WIFE'S TORTS, AND THE MARRIED WOMEN'S PROPERTY ACT.

IN the late case of *Earle* v. *Kingscote*[1], in which a common law action of deceit was brought against a husband and wife to recover damages for a false representation made by the wife, it was agreed between the parties[2], in accordance with the case of *Seroka* v. *Kattenburg*[3], that the husband's liability was not affected by the Married Women's Property Acts. It is submitted, however, that the decision in *Seroka* v. *Kattenburg*, that a husband may still be sued jointly with his wife in respect of wrongs done by her, is of doubtful authority and should be reconsidered. The ground taken in giving judgment in that case was that the Married Women's Property Act, 1882, contains no provision expressly removing a husband's liability to be sued jointly with his wife in respect of her torts, and therefore such liability remains[4]. But when we consider the real nature of a husband's liability in respect of his wife's torts at common law, there seems to be good reason for doubting the correctness of this conclusion. At common law, a wife was not under an incapacity in respect of wrong like her incapacity in respect of contract. She had the obvious human capacity of doing harm to others; and she was perfectly competent at law to incur an obligation *ex delicto*. And if she incurred such an obligation, it attached properly upon herself, and not upon her husband. For a tort committed by a wife was, and is, no *cause of action* against her husband: but it was, and is, a good *cause of action* against herself[5]. In consequence, however, of the general common law rule, that a married woman could not sue or be sued by herself alone, it was necessary, on suing a wife for her tort, to join her husband as co-defendant[6]. If the action were successful, judgment was given against the husband and wife *jointly*. The

[1] [1900] 1 Ch. 203. [2] See [1900] 1 Ch. 205. [3] 17 Q. B. D. 177.

[4] The Act provides (sect. 1 (2)) that a married woman shall be capable of suing or being sued in tort in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her. The judges (Mathew and A. L. Smith) held that these words do not discharge the husband from his old liability, but were intended to give to a person injured by a wife the option of suing her and her husband together or her alone.

[5] See *Keyworth* v. *Hill*, 3 B. & A. 685; *Vine* v. *Saunders*, 4 Bing. N. C. 96; *Cutterall* v. *Kenyon*, 3 Q. B. 310; *Capel* v. *Powell*, 17 C. B. N. S. 743.

[6] Bac. Abr., tit. Baron and Feme (L); *Head* v. *Briscoe*, 5 C. & P. 484; 38 R. R. 841; 2 L. J. N. S., C. P. 101.

wife was personally liable upon such a judgment just as much as the husband; and before the abolition of imprisonment for debt, she might have been taken in execution and imprisoned to satisfy such a judgment, whether her husband were also taken in execution or not[1]. And the wife's liability for her torts continued after her husband's death or the dissolution of the marriage, when she might be sued alone in respect of them. But the husband's liability for his wife's torts was a mere consequence of his liability to be sued jointly with her. If the wife died or the marriage were dissolved, the husband could no longer be sued for his wife's tort, and any action commenced during the marriage upon such a cause of action at once abated. So that a husband sued jointly with his wife for her tort escaped all liability if his wife died before judgment[2]. And the like law prevailed in the case of a tort suffered by a wife. It was a good cause of action by the wife; but at common law her husband must have joined in suing in respect thereof during the coverture. If he died, she could sue alone for a wrong done to her during coverture; but a joint action brought for such a wrong during the marriage abated on her death[3]. That a wrong done to a married woman is a good cause of action by her was recognized by the Court of Appeal in *Weldon* v. *Winslow*[4], where it was decided that the Married Women's Property Act, 1882, enabled a married woman to sue alone in respect of a wrong done to her before the Act came into operation, notwithstanding that before the Act husband and wife must have joined in suing for such a wrong, and the husband had the right to reduce into his own possession any damages awarded in the action. In that case the Court held that the effect of the Act was (in the words of Bowen L.J.[5]) 'to destroy the disability of the wife for the purpose of procedure.' But, as we have seen, the liability of a husband for wrongs done by his wife was a mere consequence of her incapacity to sue or be sued alone[6]. If, therefore, the effect of the Act be to destroy this disability of the wife, would it not appear to follow that a husband should no longer be liable to be sued for his wife's torts, which give rise to no cause of action against him, and for which she can now be sued alone?

[1] *Finch* v. *Duddin*, 2 Stra. 1237; *Ferguson* v. *Claycorth*, 6 Q. B. 269; *Newton* v. *Boodle*, 9 Q. B. 948; *Newton* v. *Boodle*, 4 C. B. 359; *Larkin* v. *Marshall*, 4 Ex. 804. The court would exercise its discretion in discharging the wife, if she had no separate property, but otherwise not; *Edwards* v. *Martyn*, 17 Q. B. 693; *Ivens* v. *Butler*, 7 E. & B. 159; *Ex parte Butler, Jay* v. *Amphlett*, 1 H. & C. 637.

[2] See Hardres, 161; *Baron* v. *Berkley*, 1 Lut. 670; *Capel* v. *Powell*, 17 C. B. N. S. 743.

[3] See Bac. Abr., Baron and Feme (K), and the cases cited above, p. 191.

[4] 13 Q. B. D. 784. [5] 13 Q. B. D. 788.

[6] This point is made especially clear in *Capel* v. *Powell*, 17 C. B. N. S. 743, where it was held that, after a marriage had been dissolved by divorce, the husband was no longer liable to be sued in respect of wrongs done by the wife during the coverture.

It was decided by the House of Lords in the case of *Companhia de Moçambique* v. *British South Africa Co.*[1] that the true test of obtaining relief under the present practice is whether the suitor has a good cause of action against the person sued. Can it therefore be good law that a man injured by a wife shall successfully sue her husband jointly with her, when he has no cause of action against the husband, and when the rule of procedure no longer exists which made the husband a necessary party to actions against the wife?

It should also be noted that counsel for the successful party in *Seroka* v. *Kattenburg* pressed the judges with the erroneous *dictum* of Jessel M.R. in *Wainford* v. *Heyl*[2]. In that case the Court refused to order a married woman's separate estate to be applied in making good a loss to the plaintiff caused by a breach of trust on her part. This was doubtless a sound decision; but in the course of his judgment the late learned judge remarked: 'One cannot conceive why she should be made liable for general torts in reference to trusts any more than for general torts at law. Strictly speaking, she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability[3].' This was a correct statement of the doctrines of equity; for in equity the husband of a female trustee was regarded as the legal owner of the trust property, and it was considered that in respect of a breach of trust or *devastavit* the acts of the wife were the acts of the husband, who was liable to be decreed to make satisfaction therefor in proceedings in equity brought against him *alone*, either during the coverture or *after its termination*[4]; so that in equity the wife's breach of trust was a good cause of action against the husband. But, at common law, as appears from the authorities cited above, wrongs done by a wife are, and always have been, a good cause of action against her, but not against her husband, who is not liable when the coverture is at an end. So that the *dictum* above quoted appears to have been an incautious utterance so far as it deals with liability for a married woman's torts *at law*.

It is impossible to close this article without remarking on the perversely narrow spirit in which the Married Women's Property Act, 1882 has been interpreted. The draftsmanship of the Act certainly cannot be commended: but its authors have good reason to complain of some of the glosses which have been placed upon it. If the Act be read with an open mind and with reference to the rules of the common law relating to husband and wife, it seems reasonably plain that the Act was intended to confer on wives a legal

[1] [1893] A. C. 602. [2] L. R. 20 Eq. 324. [3] L. R. 20 Eq. 325.
[4] See *Paget* v. *Read*, 1 Vern. 143; *Adair* v. *Shaw*, 1 Sch. & Lef. 243; *Kingham* v. *Lee*, 15 Sim. 396, 401; *Smith* v. *Smith*, 21 Beav. 385; *Charlton* v. *Coombes*, 4 Giff. 382.

capacity equal to that of single women in the way of acquiring, holding, and disposing of property, and a like power of making contracts, with the proviso that their obligations so undertaken should be discharged, if exacted by law, out of their separate property; that is, out of their own and not their husband's property[1]. The judges, however, seem to have been seized with the notion that the scheme of the statute was merely to invest married women with the like powers, though cognizable at common law, of holding, alienating, and making engagements on the faith of their separate property as they previously enjoyed in equity in respect of their separate estate. Hence arose the absurd doctrine, now removed by statute[2], that a wife should not be liable under the Act in respect of any contract made by her, unless it were proved that she had some separate property, free from restraint on anticipation, at the time when she made the contract[3]. Hence arose the mischievous decision that a wife is not personally liable on her contracts, and cannot, therefore, be imprisoned under the Debtors Act, 1869, for failure to pay her debts, although she has had the means to pay them[4]. If the Courts had been guided in the construction of the Act by the general law of contract, if they had discarded the analogy of wives' general engagements in equity, and if they had firmly maintained, in the case of married women, the principle that the essence of contract is the creation, quite irrespective of the contracting party's present means, of a personal obligation to perform a promise[5], there would hardly have been need for an amending Act to

[1] See sect. 1 (1, 2).

[2] Stat. 56 & 57 Vict. c. 63.

[3] *Pulliser* v. *Gurney*, 19 Q. B. D. 519; *Leak* v. *Driffield*, 24 Q. B. D. 98; *Felton* v. *Harrison* [1891] 2 Q. B. 422.

[4] *Scott* v. *Morley*, 20 Q. B. D. 120. The Act provides (sect. 1 (2)) that a married woman shall be capable of entering into and *making herself liable* in respect of and to the extent of her separate property on any contract, and may be sued thereon alone, and any damages or costs so *recovered against her* shall be payable out of her separate property, and not otherwise. The court held that the last words so controlled the others that, although a married woman's contract may result in a debt due from her, she cannot incur the same personal liability to pay as is incumbent on a man; and that she was free from imprisonment under sect. 5 of the Debtors Act, partly on the ground that such imprisonment was a substitute for execution on a judgment by *ca. sa.* It is submitted that it was quite open to them to have decided the other way; and that no more, if so much violence would have been done to the letter of the Act in holding that the controlling words were those which enabled the wife to make *herself* liable and judgment to be recovered against *her*, and that the concluding words were only intended to relieve the husband from liability. Since imprisonment for debt has been abolished a man is only liable on his contract in respect of and to the extent of his property; and it is now held that imprisonment under sect. 5 of the Debtors Act is merely punitive, and is not an execution of the judgment; *Stonor* v. *Fowle*, 13 App. Cas. 20; *Re Watson* [1893] 1 Q. B. 21.

[5] The very librettist has displayed a sounder instinct; witness the case of *La Dame Blanche*, where a vendor having unwisely put up property for sale without stipulating for payment of a deposit, finds his offer accepted and himself bound by contract to an avowedly penniless officer.

make wives' contracts enforceable as against property coming to them after the coverture has determined [1].

To the same narrow spirit is attributable the maintenance since the Act of the rule of construction that, on a gift of any property to a husband and wife and a third person either jointly or in common, the husband and wife take only one half share between them [2]; a rule which is entirely at variance with the common sense of laymen, and which would obviously cease to exist if the wife were really endowed with what the Act purports to give her, viz. the *same capacity* of acquiring and holding property as a single woman has. Another instance is the decision [3], now cured by statute [4], that a wife's will made during coverture was not effectual to pass property acquired by her after her husband's death. And the same spirit is responsible for the inconvenient decision [5] that the Act only confers on a married woman a special and peculiar capacity to hold and dispose of property which is hers beneficially, and does not enable her to hold and alienate property as her separate property at law, if in equity she be entitled on trust for another. It is submitted that in every one of these cases the difficulties certainly raised by the wording of the Act might well have received a different solution; and that the opposite construction to that which has received judicial sanction might have been adopted without doing violence to the letter of the Act, and would have been more reasonable, more consistent with general legal principles, and more convenient.

T. Cyprian Williams.

[1] Stat. 56 & 57 Vict. c. 63, s. 1, passed to correct the effect of the cases cited above, p. 194, n. 3, and *Stogdon* v. *Lee* [1891] 1 Q. B. 661. See *Softlaw* v. *Welch* [1899] 2 Q. B. 419.
[2] *Re March*, 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148.
[3] *Re Price*, 28 Ch. D. 709; *Re Cuno*, 43 Ch. D. 12.
[4] 56 & 57 Vict. c. 63, s. 3.
[5] *Re Harkness and Allsopp's Contract* [1896] 2 Ch. 358.

THE COMPLETE LEGISLATOR: A SOCRATIC DIALOGUE.

Cebes.

WELL met, Socrates! about what are you philosophizing with your head in Nephelococcygia?

Socrates. I am considering, Cebes, whether you and Alcibiades and other brilliant young men are real things or only shadows.

Ceb. Let us hear your conclusion by all means, Socrates, on so important a matter.

Socr. First tell me where you and your friends are going, so that we may see if our ways lie together.

Ceb. We are all going to sup with Ctesias—him yonder with the first down on his cheek—who is to propose a resolution in the Council to-morrow.

Socr. A resolution! about what, Cebes?

Ceb. Ctesias is of opinion that women ought to be trained in athletic exercises, equally with the men: for why, he says, should they, having bodies like men, and needing health as much as men, be confined always in the women's apartments?

Socr. This is a bold proposal, Cebes. Will the Athenian women be thankful, think you, to Ctesias for the innovation?

Ceb. Perhaps not, Socrates, but what the legislator has to consider is, I suppose, the benefit of those legislated for, not their likings or dislikings.

Socr. So that what we have to consider in this case is whether it is beneficial or not for women to exercise in public, and to run and jump, and throw the discus just like men. Then how shall we be able to find this out?

Ceb. In my opinion, Socrates, we can only find out what is beneficial to women in this respect by trying the experiment, and seeing whether the running in the stadium, and the boxing and charioteering will make them taller and stronger and more beautiful—better models for the sculptor—than those who live in an effeminate way in half-darkened rooms, and spend their time in gossiping about trifles, and eating sweet cakes and other unwholesome things.

Socr. You have sketched a pleasant picture, Cebes, of the woman of the future . . . but what if you and Ctesias are being carried

away by the ardour of your imagination, and instead of our women being made divinely tall and healthy and beautiful, this fisticuffing and wrestling and other rough exercises should mar all the grace and charm which they now possess, and should make them rude and independent and mannish, and disdainful of love and of the tendernesses of life? Will you not have committed a most disastrous blunder, and one, too, not easily repaired, if instead of transforming our women into so many Atalantas you should change them into Amazons or Medusas?

Ceb. There certainly seems a danger of our doing so, Socrates.

Socr. May it not be well then, Cebes, that before Ctesias carries his resolution he should find out what other Greek states, and perhaps some of the barbarians, who are not without intelligence, have done in this matter, and how far their attempts have been successful?

Ceb. I am inclined to think you are right, Socrates, for the best things are those which are most easily ruined, and woman is the fairest of created things, as one of our orators has said.

Socr. Then if we are to inquire what other states do in this matter, are there not the Lacedaemonians, who have this very institution which Ctesias is for introducing? For the Laconian damsels, before marriage, are accustomed not only to march in the religious processions, and to sing and dance at the festivals, but to contend with one another in running and wrestling and boxing, and that, too, wearing only a σχιστὸς χιτών, and there are those who tell us that this training, though it gives them a fine shape and complexion, makes them imperious and unruly and lax in their conduct after they are married, and not even brave when they ought to be, as they showed when the Thebans marched into Lacedaemonia; though I know Xenophon, who is enamoured of everything Laconian, will not agree with us here. Then ought not Ctesias to study how these things are, Cebes, before he attempts to legislate?

Ceb. Why certainly, Socrates.

Socr. And will not this be the sound principle for the legislator who would make useful laws, and laws which will last to follow on all occasions, so that he may benefit by the experience of others? For instance, Phocion was lately telling me that the Cretans, who you know are great archers, have invented a bow, made of a certain kind of wood there, which will shoot half as far again as the ordinary bow. Then what should we say of the general who, having heard of such a bow, neglected to find out how it was made so that he might arm his own soldiers with it in case of war?

Ceb. We should surely say it was nothing short of madness, Socrates, if indeed the Cretans told Phocion the truth.

Socr. Or if an Egyptian pharmakopolist—and you know they are very clever at such things—had found out a medicine which would keep a man in health, and enable him to endure great fatigue for a long time together, and almost to grow young again; what should we say to the physician who made no inquiries about so precious a drug?

Ceb. We should surely be right, if we were his patients, in being indignant with him, Socrates.

Socr. Then what shall we say of the legislator, who pays no attention to the discoveries which legislators in other states have made by their experiments—discoveries more valuable than any kind of drug or weapon—but goes blundering on in his ignorance? Will not such an one seem as foolish as a man who should think he could walk better on a dark night by a solitary lantern than by the light of all the torches of the Panathenaic procession?

Ceb. Surely! yes, Socrates.

Socr. Nay, will not the conduct of such an one be worse than foolish, seeing that every bad law, as one of our wisest men has said, is little short of a crime, bringing loss or misery or disease on the people?

Ceb. I can well understand this, Socrates.

Socr. So that such a legislator—a legislator, I mean, who neglects all inquiry of the sort we are speaking about—is likely, is he not, to do more harm than good by his legislation; and we may justly call him a pseudo-legislator, and hardly better than a kind of charlatan?

Ceb. I am very much disposed to be of your opinion, Socrates, and now I think of it, I seem to have read somewhere that Solon, before he drew up his celebrated Constitution, visited a number of countries both Greek and barbarian.

Socr. I have read the same, Cebes, and Solon seems to me to have shown his wisdom in nothing more than in doing as you say. For consider it in this way. Are not all communities—being composed of men, women, and children with the same natures and the same needs—necessarily very much alike?

Ceb. Very much alike, Socrates.

Socr. And do not such communities aim at the same end, that is to say, τὸ εὖ ζῆν? And will they not, that they may attain this end, want to buy and sell, and get gain and to marry—the women especially, that they may have husbands to rule? And will they not want to educate their children; and will not some of them take to

cheating and stealing, as the easiest and pleasantest way of making a living?

Ceb. Certainly, this is what we see in most states, Socrates.

Socr. Then, if the rulers in one state have found out a way, let us say, of teaching children by making education a pleasant game, like the Boeotians in their *παιδοκήπαιον*, or of preventing dishonesty and persuading those who cheat and steal, either by lantern-lectures or by oakum picking, or some other such clever device, that it is better and more profitable in the end to be honest; will not he be convicted of incredible folly, who, when he is legislating about thieves or young children, takes no account of these methods, forgetting the old saying that 'what is sauce for the goose is sauce for the gander also'?

Ceb. Why yes, Socrates, but may it not be that such an one is afraid of being charged with *πολυπραγμοσύνη*, and thinks, as you yourself have said, that each man should mind his own business? For I remember once hearing a witty fellow say that a jurist was a man who knew something about the laws of every country but his own.

Socr. Well aimed, Cebes, you are a good boxer I see, but I do not admit that you have 'landed,' as the sporting men would say, for this conclusion of mine about each man minding his business is not in any way, when you think about it, inconsistent with the true function of the legislator and the jurist.

Ceb. I am rather puzzled how this is, Socrates.

Socr. For what is it at which the true legislator or jurist aims? Is it not to lay down such laws as will make men good citizens, each fulfilling his proper function in the state, and giving what is due to his wife and his children, and his slaves, and his fellow citizens? And to do this, must not the legislator find out what is the true principle which ought to govern the relation between husband and wife, and master and slave, and debtor and creditor, and such like persons, and what punishments are best for the contumacious —seeking his knowledge from all states which he can meet with, and using his principle, when he has found it, as a sort of foot-rule —to measure the particular laws of each country, his own included, and see how some states exceed and others fall short of the true mean? And thus he will arrive—will he not?—at the perfect symmetry of the state, just as the sculptor, who has got the true idea of the beautiful from looking at many human forms of graceful proportions, will be able to see in what respect ordinary men and women err either by excess or defect.

Ceb. This certainly seems the right way of proceeding, Socrates.

Socr. And thus the legislator will be able—will he not?—to frame

laws which will procure for those he legislates for, that at which, as we said before, all communities aim—τὸ εὖ ζῆν.

Ceb. Assuredly, Socrates.

Socr. But I see, Cebes, that Ctesias has long since been beckoning us to make haste, and evidently thinks that I have fallen into one of my trances: so let us be going, and perhaps as the wine goes round Ctesias will be able to furnish us with some convincing arguments as to these proposals of his about our women.

EDWARD MANSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A History of the Law of Nations. By THOMAS ALFRED WALKER, LL.D. Vol. I. Cambridge University Press. 1899. xxx and 361 pp. (10*s.* net.)

THIS, the preface gives us to understand, is the first of two volumes. The present one goes back to the Israelites and comes down to the Peace of Westphalia (1648), that is to say to the time of Grotius. The traces of self-restraint exercised by the more civilized nations in antiquity are hardly to be classed as international, but the author reviews them all. It was only under the influence of the crusades and chivalry, and with the growth of different States on almost the same moral level, that an elementary international practice began to set bounds to the ferocity of the combatants in war, and to protect the friendly intercourse of men in time of peace. The Reformation let loose the baser instincts of mankind, but the Peace of Westphalia finally established a European system of territorial sovereign States, forming a community of nations, out of whose common interests, negotiations, groupings, and intercourse there grew up usages forming an international law properly so called. In the second half of the present volume Dr. Walker deals also with the theoretical writers and moralists who preceded Grotius and set men thinking about rights and wrongs in international relations. It closes with an exhaustive analysis of the contents of *De jure belli ac pacis.*

A history of International law is wanted. Ward's two volumes published in 1795 are necessarily out of date; Hosack's book is rather international history in general than history specifically confined to international law; and Wheaton's fine work is anything but exhaustive, and often diffuse and unsubstantiated by authorities. Dr. Walker's shows signs of a careful examination of sources and wide reading throughout, and his excellent index will make the book invaluable to the student. But the real test has still to come, for international law, in its practical aspect, as the author admits, has only grown up since Grotius. We much doubt in fact whether there is any connexion whatsoever between the international practices of antiquity and modern international law, except through the influence of the civilians.

Nor do we think Dr. Walker has sufficiently dwelt on the influence of the Italian Republics. These Republics formed a community of states long before the age of the Peace of Westphalia, and from them much of later European statecraft we know was derived. T. B.

The Law of Landlord and Tenant. By WILLIAM MITCHELL FAWCETT. Second Edition. By JOHN MASON LIGHTWOOD. London: Butterworth & Co. 1900. 8vo. cxix and 608 pp. (21*s.*)

THIS work was first published in 1871, and this edition is certainly an improvement on the first. It is usually a matter to be regretted by the reader when it is ascertained that the author of a useful text-book has been forced, through press of engagements, to hand over the charge of an edition to a stranger. However, in this particular case the editor has, it appears, had some slight assistance from the author, but whether it is due to such assistance or not, it is clear that the present edition has been very carefully prepared; and in the main the crisp mode of dealing with the points discussed, which is of so great value to the hurried practitioner, has been preserved.

The book deals with all the case and statute law which can be fairly said to relate to landlord or tenant, but does not (see however notes on p. 442) pretend to furnish any precedents of leases or other transactions of a like nature. So far as we have been able to ascertain, the cases have been well selected, especial care having been taken not to irritate the reader with long lists of references to cases which only bear incidentally on the matter under consideration.

The index is clear, though not voluminous; and there is no doubt that this edition will create a very favourable impression among the legal profession. B. L. C.

The Law as to the Appointment of New Trustees, with appendices containing forms and precedents and material sections of the Trustee Act, 1893, *and the Lunacy Acts,* 1890 *and* 1891. By J. M. EASTON. London: Stevens & Haynes. 1900. 8vo. xxiv and 207 pp. (7*s.* 6*d.*)

THIS little book will, it is thought, meet a real want. Hitherto practitioners have found it necessary to refer to many text-books to obtain any full information respecting the appointment of new trustees; the author has now placed at their disposal an admirable collection of the cases from all sources, and statutes dealing with this branch of the law.

Many mistakes on titles, involving considerable expense to rectify, have arisen by reason of insufficient care or knowledge of this subject, but this book, if widely used, ought to render such mistakes infrequent in the future.

The author (pp. 20, 145) seems to think that the question, whether a trustee 'refusing to act' within the meaning of the statutory power includes a disclaiming trustee, might with advantage be brought before the Courts. We would, however, submit that it is a little late, having regard to the universal practice of conveyancers to read the words as applying to a disclaiming trustee, for the Courts to be asked to consider the point.

It will be observed (p. 157) that the author, even in the case of the appointment of new trustees of a will, adds a declaration of trust to the deed of appointment. This, having regard to s. 8 of the Trustee Act, 1888, would operate to extend the time within which an action might be brought against the trustees, and it may be questioned whether it is proper to place the trustees, who execute the deed, in any worse position in regard to the Statutes of Limitation than the original trustees of the will. B. L. C.

Archbold's Pleading, Evidence, and Practice in Criminal Cases. By Sir JOHN JERVIS. Twenty-second Edition, by W. F. CRAIES and GUY STEPHENSON. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1900. 8vo. cxviii and 1349 pp. (31*s.* 6*d.*)

THIS well-known work may probably be taken as typical of the kind of text-book on which the English lawyer pins his faith. Most practitioners in our criminal courts entirely refuse, not without good reasons from their point of view, to take criminal law seriously, and most of our judges of one kind or another are too conscious of the wasted opportunities of their youth to care to deal with much of the law they hear propounded in the Crown Court as it deserves. The result is that Archbold has acquired a degree of authority to which it is not in the least entitled, either on the merits of the work or from considerations of practical convenience. Facts being as they are, however, it is very fortunate that the despotism of Archbold should be administered under the supervision of the present editors. No one could be found better qualified than Mr. Craies to perform the double task of introducing the greatest possible degree of order into the chaos bequeathed to us by the accumulated labours of Archbold, Jervis, Welsby and Bruce; and of introducing a dictum from Comb. or excising a judgment from 2 C. & K. Mr. Stephenson has an experience in certain mysteries, which, though short, is surpassed only by those of some four or five other men in the world. In matters of arrangement the editors are naturally hampered by the necessity arising from commercial considerations of avoiding any change which a careless reader would notice; but good work has been done by treating Murder and Manslaughter under the head of Homicide, and then going on with concealment of birth and abortion. Costs are most admirably treated of in a chapter of their own, and not as heretofore as a part of 'Parole Evidence.' Similarly compensation and restitution of property form the subject of another chapter, and need not be dug out of 'Verdict and Judgment' and 'Larceny' *passim*. In matters of detail enough bad law is left in to satisfy all reasonable superstition. We are still told what various judges in different circumstances thought constituted concealment, as when something was placed in an open box, in two closed but unlocked boxes in a frequented room, in a locked box, in a locked pinfold with a path along the top of one of its walls, and so forth. We regret to find that the editors have not gathered up courage to omit malice 'express or implied' from the definitions of murder and manslaughter, but they have at least put the reader in the way of discovering that the distinction is probably incomprehensible and certainly mischievous. The first matter they discuss in dealing with the two offences is how far they can be committed by an idiot who has 'a consciousness of doing wrong, and of course a discretion or discernment between good and evil' (1 Hawk, c. 1); but they forbear to remind us that it is no defence to murder to prove that the deceased was a Jew (1 Hale, 433). We owe the editors thanks for the discovery of *R.* v. *Keate*, 1697, Comb. 406, supporting the modern view of constructive murder in disapproving of the dictum as to the shooting at the barn-door fowl, and it is pleasing to find this case collocated with *R.* v. *Serni*, 1887, 16 Cox, 311 and *R.* v. *Whitmarsh*, 1898, 62 J. P. 711. Many new forms of indictments inspire us with confidence, not because we fully appreciate their merits, but because of the authorities quoted for their validity, and the great pains which have been expended in their collection. In minor matters of arrangement, such as paragraph side-headings, an elaborate system of indicating the effects of the legislation of

24 & 25 Vict., and above all in the index, which has repulsed all the attacks we have made on it, this work is as good as infinite pains and an appreciation of all modern book-making devices can make it. Altogether the work contains defects which will make it acceptable to the majority of its readers, and merits which will be gratefully recognized by the rest.

English Political Philosophy from Hobbes to Maine. By WILLIAM GRAHAM, Professor of Jurisprudence and Political Economy at Queen's College, Belfast. London: Edward Arnold. 1899. 8vo. xxx and 415 pp. (10*s.* 6*d.* net.)

HOBBES, Locke, Burke, Bentham, J. S. Mill, Maine—these are the writers upon whose works Mr. Graham has based his treatise on political philosophy. His method is to give a detailed account of the leading books and to add a running commentary of his own; but the commentary plays too conspicuous a part for the work to be really effective. It is useful to have the ideas of these great thinkers recapitulated and to have their relations to each other pointed out, but it would have been better had Mr. Graham trusted a little to the reader's power of reflection and restrained his own facility of criticism. The result is that a book which in design is good, and in performance is in many respects praiseworthy, is largely spoilt by being too discursive. One of the main objects at which Mr. Graham aims is the rehabilitation of the notion of natural law. 'May we not,' he says in his Introduction, 'attain to an *a priori* science of natural law or natural rights; and use and apply its principles deductively to new cases, as is certainly still done in courts of justice by our ablest judges? I believe we may, but more in the case of private than public law, more with reference to private rights than political rights.' And this position is strongly defended at the close of the book, where Mr. Graham repudiates the doctrines of Bentham and Austin, founded as they are upon utilitarianism and positive law, and seeks a basis for law in men's natural perception of justice. The only purpose of utility is to fill gaps in natural law or to restrain natural law when its full realization is impracticable. 'In short,' he says, 'the rules of justice rest fundamentally on natural justice and natural rights, supplemented by considerations of utility.' But, after all, the natural law which Mr. Graham champions is no more than the ideal law at which legislators aim, but to which they never completely attain. The notion of a 'law of nature' in the past has made the improvement of actual law more practicable, and it is in this aspect that the subject can be most usefully treated. But to attempt to revive the notion for English thinkers at the present time is to perpetuate confusion. Carefully calculated utility may be out of the question in many cases, and our safest course may be to base actual law upon the innate sense of justice. To this extent it is easy to go with Mr. Graham, and possibly this is all he means. But with respect to the law of nature as a distinct entity it is necessary carefully to confine the notion to its proper sphere. It has played a great part in days gone by, and as a matter of history it is important, but there its importance ends. For us the true modern law of nature is the idea of reason or reasonableness which pervades so much of the Common Law. We may add that medieval publicists who professed to be working out the law of nature constantly made the frankest appeals to utility—sometimes expressly *utilitas communis*—when they came to details.

The discussion of natural law, however, is only one feature of a book which ranges from the social contract to the latest developments of the political machine. The chapters on Burke are, we are inclined to think, the best part of the work, and the student will find them an excellent introduction to that statesman's writings. Bentham exposes himself more easily to criticism than most philosophers, and of this fact Mr. Graham takes full advantage. The reader who is interested in the estimate which a writer in political philosophy puts upon the prime ministers of the last 150 years should refer to p. 269, where the matter is discussed in connexion with our present method of selecting our rulers, the prime minister being, as Mr. Graham points out, our nearest approach to a king. The chapters on Mill stray rather far from politics and deal with sociology in general—an example of the discursive nature of the book on which we have already remarked. Taking the book as a whole, the student will find it a useful guide in his reading, and it should increase the general interest in the great writings with which it deals. Its value, moreover, is largely enhanced by the numerous historical parallels with which Mr. Graham supports his criticisms.

A History of Politics. By Edward Jenks, M.A. London: J. M. Dent & Co. 12mo. viii and 164 pp. [In the 'Temple Primers' series.]

The scope of this book would perhaps be more readily understood if it was called a history of Government or of Institutions: but the growth of political science, and the ambition of divers younger branches of study to be included in it, have caused the word Politics to 'surprise in himself' many things which would indeed have surprised politicians of our grandfathers' time if represented to them as belonging to their art. Like Mr. Jenks's other writings, this exposition is ingenious almost to excess, and a little defective in the critical sense of proportion. But it is thoroughly well fitted to interest readers in the subject, and, while it will give them much to reflect on, will give them far less to unlearn than most books of the kind hitherto available to the miscellaneous reading public. For example, the importance of judicial institutions in general political development is now perhaps for the first time adequately insisted upon in a popular book. When Mr. Jenks, speaking of marriage by capture, represents the modern wedding tour as 'a survival of the flight from the angry relatives of the bride,' we presume he is jesting. This might be so if the wedding tour were an ancient, popular, and widespread Indo-European custom. In fact it is very modern, confined to persons of a certain social standing, and unknown or all but unknown outside English-speaking communities. The vulgar belief that a man may sell his wife, which has been acted upon in quite modern times as a short and simple method of divorce, is much more likely to contain a survival of something prehistoric.

Certain omissions in Mr. Jenks's book puzzle us. Next to nothing is said about the ancient military monarchies of the East, which surely formed a type of government important enough to deserve mention; and there is very little, though something, about the weaker specimens of the same type which survive in modern Asiatic kingdoms. Again, we find no recognition of the 'matriarchal' theory of prehistoric society which from about twenty to thirty years ago seemed like to carry all before it. If Mr. Jenks thinks it is dead, we do not feel called upon to be chief mourners. But McLennan was not an adversary to be despised, and we rub our eyes when

we see Morgan often cited and McLennan never. We have no right, perhaps, to assume from Mr. Jenks's silence about Mr. Kovalevsky's excellent work, accessible partly in English and partly in French, that he has not used it. There is none better of the kind. As to Ihering's brilliant posthumous 'Vorgeschichte der Indo-Europäer,' it would hardly have been a safe source to draw upon for an elementary book. Mr. Jenks may or may not be already acquainted with it. If not, he has a good deal of intellectual pleasure to come. As to minuter points, it may be observed that there is nothing specially Pathan about the Persian word *khán*, and zamíndárs are by no means universal in India. The general reader for whom the book is intended would never suspect from Mr. Jenks's mention of this last term that it is pure Persian, and belongs to the official system of the Moghul dynasty. Certainly one cannot tell people everything in a small book: but there was no need to bring in such exotic terms at all.

The Law of Mines and Minerals. By the late WILLIAM BAINBRIDGE. Fifth Edition, by ARCHIBALD BROWN. London: Butterworth & Co. La. 8vo. lxxviii and 859 pp. (£2 2*s*.)

BAINBRIDGE on Mines has been familiar to a whole generation of lawyers. In the first eleven years of its life it passed through four editions, and it is now just twenty-two years since the fourth edition appeared. This is a long interval for a living branch of the law like that of mines and minerals, and it is no wonder that Bainbridge was being supplanted by younger rivals.

Mr. Brown appears now to have applied himself with zest to the preparation of the new edition and has produced a work which, whilst it retains a good deal of the old, includes so much that is new that it may almost rank as a new book. We have carefully tested it in many parts, and find it in all respects accurate and complete. It appears to contain references in the addenda, if not in the body of the work, to all important cases reported down to the end of 1899. *Hexter v. Pearce* [1900] 1 Ch. 341 and *In re Newell* [1900] 1 Ch. 90 were decided last year, but as they were not fully reported till this year, some excuse may be found for their exclusion.

Not the least useful part of the book is the glossary of English mining terms, giving explanations of a large number of technical and local words the meaning of which is not easily ascertained from other sources.

The large collection of precedents for leases, conveyances, and so forth in the appendix will doubtless be appreciated by conveyancers. We can heartily congratulate Mr. Brown upon his work, and if our review is short in proportion to the importance of his work our excuse is that we have no faults to find, and that eulogy will not bear repetition.

Concise Precedents under the Companies Acts. Second Edition. By F. GORE-BROWNE. London: Jordan & Sons, Lim. 1900. 8vo. xliv and 1552 pp. (20*s*.)

IT is curious to observe how much forms have become a part of the modern law book. They take the place of the diagram or pictorial illustration in other kinds of literature: so much so that the book of the future promises to be a book of forms with just as much law in the shape of notes as will render the forms comprehensible. Instead of the elaborate analysis and discussion of legal principles and the sifting of authorities contained in such a treatise as Lindley on Partnership for instance, practitioners content

themselves with dipping 'into digests, or with what Coke calls the 'tumultuary reading of abridgements.' The present volume, however, is not and does not profess to be a treatise on company law. It is a book of company forms with useful introductions and explanatory notes. In its first appearance—eight years ago—it was a small unpretending book: it has now expanded into a portly volume of 1,000 pages covering the whole field of company enterprise—Memorandums and Articles of Association, Promoters, Underwriting Calls, Meetings, Borrowing, Winding up, Reconstruction. 'Concise Precedents' is the title Mr. Gore-Browne gives to his book, and the forms deserve that description, but incidentally we note that Mr. Gore-Browne has not seen his way to give us a form of Memorandum of Association which does not in its enumeration of the company's objects exhaust, and more than exhaust, all the letters of the alphabet. Mr. Gore-Browne writes with the authority which comes of a practical as well as a theoretical acquaintance with his subject, and his book deserves to meet, and is certain to meet, with a favourable acceptance from the profession.

The Magistrate's Annual Practice, 1900: *being a compendium of the Law and Practice relating to matters occupying the attention of Courts of Summary Jurisdiction, &c.* By CHARLES MILNER ATKINSON, Stipendiary Magistrate for the City of Leeds. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1900. 8vo. lxxxvii and 878 pp. (20*s.*)

The Justice's Notebook, containing a short account of the Jurisdiction and Duties of Justices, and an Epitome of Criminal Law. By the late W. KNOX WIGRAM. Seventh Edition. By HENRY WARBURTON and LEONARD W. KERSHAW. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1900. xii and 444 pp. (10*s.* 6*d.*)

THIS is the fifth annual edition of the Magistrate's Annual Practice, which has before been noticed in this REVIEW as a very useful book. An annual edition is necessary, seeing that every year brings its additional burdens on the shoulders of justices, who, nothing loth, seem to have backs broad enough to bear any number of Acts of Parliament. This year justices are informed that 'It has been found necessary to add references to nearly fifty recent decisions of the High Court. There have, too, been passed during the current year (1899) more than a dozen statutes connected with the subject-matter of this work.' Yet men are ambitious, and seek to carry this burden with a light heart. The Summary Jurisdiction Act, 1899, may be mentioned as giving power to justices to punish young persons, and adults consenting, who set fire to any heath, gorse, furze, or fern. Formerly this offence could be dealt with only at assizes, with the result that practically convictions could be obtained only in very bad cases. All justices may be safely recommended to read this book, mark, learn, and inwardly digest it.

If such an addition to their burden as learning the law which they have to administer is too much to expect of human nature, the Justice's Notebook, which is really not a very formidable work to master, can be commended as a substitute. It is a good book, and handy for the use of a justice. His clerk is probably armed with a fat book of authority on the law, but as the justice is the responsible person, he may as well look up a case shortly stated, by way of check on his clerk. Justices should try to find out what evidence is.

The Stamp Laws, being the Stamp Acts of 1891, with the Acts amending and extending the same, including the Finance Act, 1899. By NATHANIEL J. HIGHMORE. London: Stevens & Sons, Lim. 1900. 8vo. xlviii and 323 pp. (10*s.* 6*d.*)

The Excise Laws. By NATHANIEL J. HIGHMORE. Second Edition. Two Vols. Vol. I, Management—Duties on Goods. Vol. II, Excise Licences—The Licensing Acts. London: Printed for Her Majesty's Stationery Office by Darling & Son, Lim., and sold by Eyre & Spottiswoode. 1899. Vol. I, xxxvii and 524 pp.; Vol. II, xxxviii and 669 pp. (30*s.*)

The Law of Stamp Duties on Deeds and other Instruments. By E. N. ALPE: revised and amplified by ARTHUR B. CANE. Seventh Edition. London: Jordan & Sons, Lim. 1900. 8vo. xxxii and 388 pp. (6*s.* net.)

MR. HIGHMORE'S book on the Stamp Laws contains a complete collection of the Acts relating to Stamps, and of the many sections conferring exemptions scattered up and down Acts not otherwise dealing with Stamp Duties. These exemptions form a long list and many of them cannot be very generally known. In point of date they extend from the Demise of the Crown Act, 1830, passed to exempt persons holding office or grants of pension from the Crown from payment of stamp duty on the demise of the Crown and reappointment to office or pension by the new Sovereign, down to the exemptions under the Truck Act, 1896. There are many useful tables in the book, and the notes appear to be quite up to date. In an Appendix will be found the Regulations for obtaining the adjudication of Stamp Duty by post. Mr. Highmore is careful to disclaim for the notes more than the expression of his personal views, but we think the profession will be glad to have even the personal opinion of the Assistant Solicitor of Inland Revenue on points of difficulty.

'Highmore's Excise Laws' is an official publication. The first edition was printed for official use only. To the present edition has been added the legislation for 1898 and 1899 and notes of recent cases. To all concerned with the Excise laws and the working of the Licensing Acts in the three kingdoms, this work will be well-nigh indispensable.

Seven editions in ten years say much for the utility and popularity of a law book. Under Mr. Cane's editorship the utility of Mr. Alpe's book should be fully maintained. Mr. Cane has thoroughly revised the book and brought it up to date. We have tested the cases noted and find that practically all cases decided before the Long Vacation of last year are included—*G. N. Ry. Co.* v. *I. R. Commissioners* [1899] 2 Q. B. 652 (July 27) is duly noted on p. 221, but is not to be found in the table of cases.

A Concise Treatise on the Law relating to Legal Representatives Real and Personal. By SIDNEY E. WILLIAMS. London: Stevens & Sons, Lim. 8vo. xlviii and 271 pp. (10*s.*)

THIS is a concise abridgment of a very extensive subject which long ago received its full and complete treatment in the classical but ponderous work on Executors by the late Mr. Justice Williams.

The subject is here divided into seventeen chapters, treating all the principal branches of the law as comprehensively as the limited space allowed to each subject will permit. The references to authorities are

strictly confined within very reasonable limits, and the latest cases are cited by preference wherever applicable. There have not yet been many decisions upon the newly constituted office of 'Real Representative,' but so far as they have gone they are here collected. This book will not take the place of 'Williams on Executors,' but it will often supply information and references to cases which will enable the practising lawyer to dispense with further investigation into the matters there dealt with at greater length.

An Index of all reported cases decided in the English Courts and many of the Irish Equity cases during the period covered by The Revised Reports. Vols. I and XL. 1785–1836. London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1900. La. 8vo. xix and 786 pp. (18*s.*)

THIS Index, although intended primarily for subscribers to the Revised Reports, is a work which will be found useful by others, and especially by the practitioner who has only a small library at his disposal. A rough calculation shows some sixty cases which have been overruled or judicially dissented from to be included as such in this Index and not in 'Dale & Lehmann.' In every instance referred to the criticism was reported before the publication of the latter work. It is only fair to assume that judicial comments in other directions are also more frequently noted in the new Index, which contains altogether some 35,000 cases. The compiler seems, however, to have overlooked the string of cases affirmed which are collected in 2 Russ. & M. at p. 751 and the observations of Lord Cairns in *Harrington* v. *Harrington*, 1871, L. R. 5 H. L. 87 at p. 107, 40 L. J. Ch. 716, respecting the authority of *Gower* v. *Grosvenor*, 1740, 5 Madd. 337 n., Barnard. 54.

The Licensing Laws so far as they relate to the sale of Intoxicating Liquors. By R. M. MONTGOMERY. Second Edition. London: Sweet & Maxwell, Lim. 1900. 8vo. lii and 541 pp. (18*s.*)

WE are glad to see a new edition of Mr. Montgomery's work. The second edition is much fuller than the first, and contains new chapters on covenants in leases relating to the sale of intoxicating liquors, covenants to take liquors from the landlord, and the innkeeper's liability in respect of the goods of his guest, besides some hundred new cases decided since the appearance of the first edition. The book, dealing as it does with such an intricate subject, is remarkably clear, and will be welcomed not only by the practitioner but by the general public who have occasion to deal with licensing matters. The cases referred to are well up to date, but one is somewhat surprised to find *Williamson* v. *Norris* [1899] 1 Q. B. 7, 68 L. J. Q. B. 31 omitted, as the case relates *inter alia* to the liability of a servant selling liquor by his master's order.

The principal Statutes connected with the subject are set out, and the Index is excellent. A word of praise should also be awarded for the way in which the work has been turned out.

Contracts in Restraint of Trade. By W. ARNOLD JOLLY. Second Edition. London: Butterworth & Co. 1900. Sm. 8vo. xx and 118 pp. (4*s.* net.)

THE author explains that 'The first edition of this treatise was published five years ago as a popular handbook. The book has now been re-modelled

and partly re-written, and in its present form is intended more particularly, if not exclusively, for the use of the legal profession.'

We may congratulate Mr. Jolly for having produced an admirably clear, complete, and sound treatise on this particular branch of the law of contract. The topic is, of course, dealt with by all writers at large on the law of contract, but we are not aware that it has ever before been treated quite so fully. It is a pity that the dates of all cases are not given. The excellent practice of so doing has now become general, and it is one that no text-writer should neglect.

Francis Lieber: his life and Political Philosophy. By LEWIS R. HARLEY, Ph.D. New York: Columbia University Press. 1899. 8vo. x + 1 leaf + 213 pp.

THE subject of this memoir, who died in 1872, is probably but little known in England, but his work has exercised great influence in moulding the best political thought of the United States. As a Prussian he witnessed the recovery of his country from the Napoleonic tyranny, and actually served in the Waterloo campaign, only to find himself an exile in the days of reaction which followed. After a futile adventure in the Greek war of independence, he settled for the rest of his life in America. He was an eminent publicist in the wider sense, but never a lawyer by profession. Nevertheless he had much to do with promoting the study of international law, and in particular with founding the *Institut de droit international*. His book on 'Legal and Political Hermeneutics' is not unfrequently referred to in American text-books.

A System of Medicine. By many Writers. Edited by T. CLIFFORD ALLBUTT. London: Macmillan & Co., Lim.; New York: The Macmillan Company. 1899. Vol. III. xiv and 998 pp.

THE only portions of this work that are of legal interest are those in which the medical jurisprudence of insanity and allied phenomena is discussed. The Introduction to this part of the work is written by Dr. Savage, who also contributes the articles on 'Mania,' 'Mental Stupor,' 'Toxic Insanities,' and (in conjunction with Dr. Wood) 'English Law and Practice in Lunacy.' No medical expert in this country is better fitted than Dr. Savage to deal with these subjects, and the only criticism we have to pass on his work is that in sketching the outlines of the law of lunacy he might with advantage have given references to a few leading authorities for his statements. Dr. Nicolson's statistical account of 'Criminal Lunacy in England' contains much fresh and not readily accessible information, and in all the medico-legal contributions the mean between too great scrappiness or generality and too great detail is well maintained.

We have also received:—

A Manual of Equity Jurisprudence for Students and Practitioners. By JOSIAH W. SMITH, Q.C. Fifteenth Edition. By SYDNEY E. WILLIAMS. London: Stevens & Sons, Lim. 1900. xxvii and 507 pp. (*12s. 6d.*).—This edition appears to be well posted up, but we regret that the editor did not lay bolder hands on it. Story's classification of equity jurisdiction is for all practical modern purposes dead and buried, and it can only confuse modern students to repeat his nebulous rhetoric about 'constructive fraud.'

Then there is something to be said for omitting the early history of the Court of Chancery altogether in an elementary book, and something for giving a concise but accurate historical statement. There is nothing to be said, in the face of modern historical knowledge—not to say Spence's still classical work—for bewildering novices with vague and inaccurate generalities. But the learner who confines himself to the practical parts of this book will no doubt find it a safe guide so far as it goes.

Law and Practice in Divorce and other Matrimonial Causes. By W. J. DIXON. Third Edition. London: William Clowes & Sons, Lim. 1900. 8vo. lx and 487 pp. (20*s.*).—The success that this book has attained fully justifies the favourable though concise review that we gave of the second edition (see L. Q. R. viii. 175). The preface states that the author has endeavoured in this edition to set out divorce law and practice in the usual order of the steps in the various proceedings, and has revised it up to date. The author follows the plan adopted in the former edition of attaching to each case in the Table of Cases a few words indicating the point raised in it. Probably this entails a vast amount of labour, but it will be very useful to the busy practitioner referring to the book in a hurry. We can only hope that this edition may meet with as much well-deserved success as the two former.

A Digest of the Law of Easements. By L. C. INNES. Sixth Edition. London: Stevens & Sons, Lim. xxiv and 131 pp. (7*s.* 6*d.*)—The success of this work is well deserved. Since its first appearance in Madras in 1878 it has been recognized by students and practitioners as a thoroughly reliable summary of the law on a subject of peculiar difficulty. This new edition contains references to the latest authorities, but otherwise the author has not found it necessary to introduce any important alterations of the text.

The Sudan Penal Code. 1899. 8vo. 130 pp. *The Sudan Code of Criminal Procedure.* 1899. 8vo. 136 pp. Cairo: National Printing Office.—The new Penal Code of the Sudan, authenticated simply by the signature 'Kitchener of Khartoum, Governor General,' is in substance identical with the Indian Penal Code. Besides the necessary verbal alterations, there are some omissions and transpositions, and a few amendments of language. The Procedure Code is also modelled in a general way on the Indian Criminal Procedure Code, but is, as might be expected, a good deal simpler.

Cato der Censor. Ein akademischer Vortrag. Nov. 1899. Von C. CHR. BURCKHARDT, Professor des römischen Rechts a. d. Universität Basel. 8vo. 32 pp.—A brilliant sketch of the leader of the old-fashioned country party in the later Roman Republic, but hardly within the scope of this REVIEW.

Stone's Justices' Manual, being the Yearly Justices' Practice for 1900. Thirty-second Edition. Edited by GEORGE B. KENNETT. London: Shaw & Sons; Butterworth & Co. 1900. 8vo. lxix and 1143 pp. (25*s.*) —The last edition of this well-known work was reviewed in L. Q. R. xv. 213. This edition appears to have been brought quite up to date.

Company Precedents for use in relation to Companies. Eighth Edition, by FRANCIS BEAUFORT PALMER, assisted by FRANK EVANS. Part II. Winding-up Forms and Practice. Part III (by the author only), Debentures and Debenture Stock. London: Stevens & Sons, Lim. 1900. La. 8vo. Part II, lxxxiv and 1174 pp. (32*s.*). Part III, xlviii and 634 pp. (21*s.*).—Review will follow.

The County Palatine of Durham: a study in Constitutional History (Harvard Historical Studies, vol. viii). By GAILLARD THOMAS LAPSLEY. New York & London: Longmans, Green & Co. 1900. 8vo. xi and 380 pp. ($2·00 net.)—Review will follow.

Ruling Cases. Edited by ROBERT CAMPBELL. With American notes by LEONARD A. JONES. Vol. XIX, Negligence—Partnership. Vol. XX, Patent. London: Stevens & Sons, Lim. Boston, U. S. A.: Boston Book Co. 1899–1900. Vol. XIX, xxv and 777 pp.; Vol. XX, xx and 860 pp. (25*s.* net.)

The Annual County Courts Practice, 1900. Edited by His Honour Judge WILLIAM C. SMYLY, Q.C., assisted by W. J. BROOKS. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1900. 8vo. Vol. I, xxxiii and 1114 pp.; Vol. II, xv and 558 pp. (25*s.*)

Elphinstone's Introduction to Conveyancing. Fifth Edition. By Sir H. W. ELPHINSTONE, Bart., JAMES W. CLARK and ARTHUR DICKSON. London: Sweet & Maxwell, Lim. 1900. 8vo. xxxv and 566 pp. (14*s.*)

Lunacy Practice. By N. ARTHUR HEYWOOD and ARNOLD S. MASSEY. London: Stevens & Sons, Lim. 1900. 8vo. viii and 174 pp. (7*s.* 6*d.*)

The Law of Employers' Liability and Workmen's Compensation. Second Edition. By THOMAS BEVEN. London: Waterlow Bros. & Layton, Lim. 1899. 8vo. xlv, 424 and xxxix pp.

First Elements of Procedure. By T. BATY. London: Effingham Wilson. 1900. Sm. 8vo. xxviii and 256 pp. (3*s.* 6*d.* net.)

Interpleader in the High Court of Justice, and in the County Courts. By MICHAEL CABABÉ. Third Edition. London: Sweet & Maxwell, Lim. 1900. Sm. 8vo. xii and 232 pp. (6*s.*)

Rouse's Practical Man. Seventeenth Edition, with many additional Tables and Calculations. Revised by ERNEST E. H. BIRCH. London: Sweet & Maxwell, Lim. and F. P. Wilson. 1900. Oblong 12mo.

Every Man's Own Lawyer. By a Barrister. Thirty-seventh Edition, carefully revised, including the legislation of 1899. London: Crosby, Lockwood & Son. 1900. 8vo. xvi and 732 pp. (6*s.* 8*d.*)

The Elements of Mercantile Law. By T. M. STEVENS. Third Edition. By HERBERT JACOBS. London: Butterworth & Co. 1900. 8vo. xxxvi, 452 and 32 pp. (10*s.* 6*d.*)

The Annual Digest, 1899. Edited by JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1900. La. 8vo. xvi and 349 pp. (15*s.*).

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.